(1)

91-808

No.

In The
Supreme Court of the United States
October Term, 1991

RITAELLEN M. MURPHY, R.N., et al.,

Petitioners,

vs.

RICHARD M. RAGSDALE, M.D., et al.,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether class members have standing to object to a settlement proposal which through an illegal and unconstitutional process guts their interests and undermines the express legislative motives of the State?

2) Whether federal courts should redefine legislative intent in areas of health safety and cost containment where the statutes in question touch on the subject of abortion?

3) Whether the actions of federal courts should be restricted by federalism.

5) Whether a State may establish personhood for unborn children so that an unborn child may through a guardian protect her own rights and interests?

6) Whether *Roe v. Wade* should be reconsidered?

PARTIES TO THE PROCEEDINGS

Petitioners-Plaintiffs-Appellants:

Ritaellen M. Murphy, who has a Bachelors of Science in Nursing, is a practicing Registered Nurse, a Critical Care Registered Nurse, a Trauma Nurse Specialist, an advanced Cardiac Life Support Instructor, a consultant to the American Heart Association, a member of the Advanced Cardiac Life Support-Target Action Group Committee, a Pediatric Advanced Life Support Instructor, a Cardiac Pulmonary Resuscitation affiliate facility member, and the Director of Life Support Services (a division of the Emergency Medical Services Department) at Loyola University Medical Center, which is a Level II Trauma Center in Maywood, Illinois. She is certified in Mobile Intensive Care Nursing. She has personally witnessed the medical and psychological complications, including suicidal ideations, which can and do result from legal abortions. She is a member of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future.

Penny R. Greenwood, who has a Bachelors of Science in Psychology, is a practicing Clinical III Registered Nurse, a Clinical III Trauma Nurse Specialist, former Department Head of Out-Patient Surgery, and a member of the emergency room medical staff at Hinsdale Hospital in Hinsdale, Illinois. She is certified in Advanced Cardiac Life Support, in Cardiopulmonary Resuscitation and in Mobile Intensive Care Nursing. She is experienced in hospital obstetrical care. She has personally witnessed the medical and psychological complications, including suicidal ideations, which can and do result from legal abortions. She is a member of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future.

Petitioners-Proposed Intervenors-Appellants:

Kenneth M. Reed, as an expectant father, proposed intervention of behalf of his unborn child and on behalf of all other Illinois unborn children. He owns his own construction business based in Clarendon Hills, Illinois.

Mark I. Aughenbaugh, as an expectant father, proposed intervention on behalf of his unborn child and on behalf of all other Illinois unborn children. He is a journeyman carpenter based in Aurora, Illinois.

Respondents-Plaintiffs-Appellees:

Richard M. Ragsdale, M.D., is an experienced abortionist, performing over 3,500 abortions per year. He filed suit on behalf of all physicians and surgeons who perform or desire to perform abortions in the State of Illinois.

Northern Illinois Women's Center is an Illinois corporation performing abortions in Rockford, Illinois.

Margaret Moe is a registered nurse, who is the sole owner and executive director of a medical facility, which desires to perform abortions in Cook County, Illinois.

Sarah Roe and **Jane Doe** are women who have had abortions in the past and may desire abortions in the future. They filed suit on behalf of all women of child-bearing age who desire or may desire an abortion sometime in the future.

Respondents-Defendants-Appellees:

Bernard J. Turnock, M.D., was the Director of the Department of Public Health of the State of Illinois and was sued in his official capacity. He was responsible for the enforce-

ment of the Ambulatory Surgical Treatment Center Act and the promulgation and enforcement of regulations under that Act, and had administrative responsibilities under the Health Facilities Planning Act. **John R. Lumpkin, M.D.**, succeeded him.

Neil F. Hartigan was sued in his official capacity as Attorney General of the State of Illinois. He was charged with the defense of challenges to the Medical Practice Act, the Ambulatory Surgical Treatment Center Act, the Abortion Act and the Health Facilities Planning Act, and their respective regulations, throughout the State of Illinois. In addition, as chief legal officer of the State of Illinois, the Attorney General represented the directors of state agencies in their enforcement activities, and upon referral by these agencies, has certain enforcement responsibilities on behalf of these agencies. He was replaced in office by **Roland Burris**.

Richard M. Daley was the State's Attorney of Cook County and was sued in his official capacity, and as representative of the defendant class of all state's attorneys of the one hundred and one other counties of the State of Illinois. He was succeeded in office first by **Cecil Partee** and then by **Jack O'Malley**, the present Cook County State's Attorney. The state's attorneys are the chief legal officers of the counties and represent the People of the State of Illinois in the enforcement of certain statutes, including the Abortion Act.

Gary L. Clayton was the director of the Department of Registration and Education and was sued in his official capacity. He was ultimately succeeded by **Nikki M. Zollar**, the Director of the successor agency, the Department of Professional Regulation. **Steven F. Selcke, Robert C. Thompson** and **Kevin K. Wright** had served as interim agency directors. All five individuals have been empowered to implement, administer, and enforce the Medical Practice Act.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Turnock v. Ragsdale (88-790)
Original Petition For Certiorari

The Supreme Court of the United States granted certiorari on July 3, 1989 but reserved consideration of the question of jurisdiction until the hearing on the merits.[1] On December 1, 1989 the Court granted the joint motion to defer further proceedings.[2] However, *Turnock v. Ragsdale* is presently pending before the Court and has been carried over to the Court's 1991-92 term.[3]

In its March 10, 1988 divided opinion,[4] as amended by April 13, 1988 order,[5] the Court of Appeals with a strong dissent decided to affirm in substantial part the November 27, 1985 opinion of the District Court.[6] In its August 12, 1988 and August 16, 1988 orders the Court of Appeals denied the Petition for Rehearing and the Suggestion for Rehearing En Banc.[7]

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[1]*Turnock v. Ragsdale*, 109 S.Ct. 3239, 106 L.E.2d 587 (1989).

[2]*Turnock v. Ragsdale*, 110 S.Ct. 532, 107 L.Ed.2d 530 (1989).

[3]*Turnock v. Ragsdale*, 59 U.S.L.W. 3013 (July 17, 1990) and *Turnock v. Ragsdale*, 60 U.S.L.W. 3013 (July 16, 1991). *Turnock v. Ragsdale* (88-790) was the oldest Appellate Docket case carried over to the Court's 1991-92 term.

[4]*Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), is reproduced in 88-790 Appendix A.

[5]The April 13, 1988 order amending the March 10, 1988 opinion and the judgment order of March 10, 1988 are reproduced in 88-790 Appendix C and Appendix B, respectively.

[6]*Ragsdale v. Turnock*, 625 F.Supp. 1212 (N.D.Ill. 1985) is reproduced in 88-790 Appendix G. The class certification and preliminary injunction order entered December 11, 1985 is reproduced in 88-790 Appendix F.

[7]The August 12, 1988 order and the August 16, 1988 amended order denying the Petition for Rehearing and the Suggestion for Rehearing En Banc are reproduced in 88-790 Appendix E and Appendix D, respectively.

Murphy v. Ragsdale **(90-714)**
Petition For Certiorari Before Judgment

On December 3, 1990 the Court denied the Petition for Certiorari before Judgment.[8] The case proceeded to oral arguments before the Court of Appeals on December 4, 1990.

Murphy v. Ragsdale
Present Petition For Certiorari After Judgment

The present Petition for Certiorari is being made after judgment by the Court of Appeals. In its August 20, 1991 divided opinion[9] the Court of Appeals with another strong dissent decided to affirm the March 22, 1990 opinion of the District Court.[10] The August 20, 1990 order, corrected on August 22, 1990 denied the suggestion for hearing en banc.[11]

JURISDICTION

This action was originally brought under 28 U.S.C. Sections 2201 and 2202 and 42 U.S.C. Section 1983 challenging the constitutionality of portions of the Ambulatory Surgical Treatment Center Act, the Medical Practice Act and the Health Facilities Planning Act, and 28 U.S.C. Section 1343 seeking declaratory and injunctive relief in a class action.

The District Court's orders of November 27, 1985 and December 11, 1985 preliminarily enjoined enforcement of portions of the Acts and the rules promulgated thereunder for first

[8]*Murphy v. Ragsdale*, 111 S.Ct. 568, 112 L.Ed.2d 574 (1990).
[9]*Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991).
[10]*Ragsdale v. Turnock*, 734 F.Supp. 1457 (N.D.Ill. 1990).
[11]The August 22, 1990 corrected order denying the Suggestion for Hearing En Banc is reproduced in Appendix at A-78.

and/or early second trimester abortions or other abortion-related procedures.[12]

With jurisdiction based on 28 U.S.C. Section 1292, the Court of Appeals with a vigorous dissent vacated as moot one portion of the District Court's decision, held unconstitutional the other challenged provisions, and affirmed the remainder of the decision on March 10, 1988.[13] The August 12, 1988 order and the August 16, 1988 amended order denied both the Petition for Rehearing and the Suggestion for Rehearing En Banc.[14]

With jurisdiction based on 28 U.S.C. Section 1254(2), defendants Turnock, Hartigan and Selke filed their Notice of Appeal in the Court of Appeals on November 7, 1988.[15] The Court on July 3, 1989 accepted the case for argument.[16] On December 1, 1989 the Court granted the joint motion of the parties to defer further proceedings.[17] However, *Turnock v. Ragsdale* (88-790) has been carried over to the Courts 1991-92 docket.[18]

The settlement proposal considered by the District Court would permanently enjoin enforcement of portions of

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[12]*Ragsdale v. Turnock*, 625 F.Supp 1212 (N.D.Ill. 1985) is reproduced in 88-790 Appendix G. The December 11, 1985 judgment order is not reported but is reproduced in 88-790 Appendix F.

[13]*Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), is reproduced in 88-790 Appendix A. Its March 10, 1988 judgment order and the April 13, 1988 order amending the March 10, 1988 slip opinion are reproduced in 88-790 Appendix B and Appendix C, respectively.

[14]The August 12, 1988 order and the August 16, 1988 amended order denying both the Petition for Rehearing and the Suggestion for Rehearing En Banc are reproduced in 88-790 Appendix E and Appendix D, respectively.

[15]The Notice of Appeal is reproduced in 88-790 Appendix H.

[16]*Turnock v. Ragsdale*, 109 S.Ct. 3239, 106 L.Ed. 587 (1989).

[17]*Turnock v. Ragsdale*, 110 S.Ct. 532, 107 L.Ed. 530 (1989).

[18]*Turnock v. Ragsdale*, 59 U.S.L.W. 3013 (July 17, 1990), and *Turnock v. Ragsdale*, 60 U.S.L.W. 3013 (July 16, 1991). As noted in Footnote 3, *Turnock v. Ragsdale* (88-790) is the oldest Appellate Docket case carried over to the Court's 1991-92 term.

the Acts and the rules promulgated thereunder for abortions and abortion-related procedures performed from conception to birth. Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers) would be created with their own separate standard of medical regulation. Many abortion sites would be excluded completely from all medical regulations and licensing requirements of the State of Illinois. A February 13, 1990 deadline was set by the District Court for interested parties to file their written objections to the settlement proposal.

On February 13, 1990 Petitioners Murphy and Greenwood filed their written objections and Petitioners Reed and Aughenbaugh filed their petition to intervene. At the fairness hearing on February 23, 1990 Petitioners Murphy, Greenwood, Reed and Aughenbaugh personally appeared and through counsel presented oral objections to the settlement proposal.

The order denying intervention by proposed intervenors Reed and Aughenbaugh was entered on March 5, 1990.[19] On March 15, 1990 a Petition to Reconsider was filed. The order of March 22, 1990, which approved the settlement proposal, denied the Petition to Reconsider the Petition to Intervene.[20] On March 30, 1990 Petitioners Murphy and Greenwood filed a Rule 52(b) Petition which was granted in part by the April 19, 1990 order of the District Court, thus necessitating the filing of new Notices of Appeal.[21]

With jurisdiction based on 28 U.S.C. Section 1291, on April 20, 1990 Petitioners Murphy and Greenwood and Peti-

[19]The March 5, 1990 order denying intervention is reproduced in Appendix at A-67.

[20]The March 22, 1990 judgment order and the March 22, 1990 order which approved the settlement proposal and denied the Petition to Intervene are reproduced in Appendix at A-66 and A-36, respectively.

[21]The April 19, 1990 order which granted the Rule 52(b) Petition in part is reproduced in Appendix at A-68.

titioners Reed and Aughenbaugh filed separate Notices of Appeal.[22] The appeal of Petitioners, Reed and Aughenbaugh included the March 5, 1990 order.

On April 23, 1990 the order of April 19, 1990 granting the Rule 52(a) Petition was docketed. With jurisdiction still based on 28 U.S.C. Section 1291, on May 18, 1990, Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh again filed separate Notices of Appeal which included the April 19, 1990 order.[23] The appeal of Petitioners Reed and Aughenbaugh still included the March 5, 1990 order.

On July 9, 1990 the District Court refused to supplement the record with the over 1200 telegrams, models, letters and other papers it considered in approving the settlement proposal.[24]

The Court of Appeals consolidated the first two appeals on May 21, 1990 and consolidated all four appeals on June 7, 1990.[25] The Suggestion for Hearing En Banc on August 20, 1990 was denied by order corrected on August 22, 1990.[26]

With jurisdiction based on 28 U.S.C. Sections 1254(1) and 2101(e) a Petition for Certiorari before judgment was made to the Court. On December 3, 1990 the Court denied the Peti-

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[22]The Notice of Appeal of Murphy and Greenwood and the Notice of Appeal of Reed and Aughenbaugh are reporduced in Appendix at A-70 and A-69, respectively.

[23]The Notice of Appeal of Murphy and Greenwood and the Notice of Appeal of Reed and Aughenbaugh are reproduced in Appendix at A-72 and A-71, respectively.

[24]The July 9, 1990 order is reproduced in Appendix at A-77.

[25]The May 21, 1990 order and the June 7, 1990 order are reproduced in Appendix at A-73 and A-75, respectively.

[26]The August 20, 1990 corrected on August 22, 1990 is reproduced in Appendix at A-78.

tion and the case proceeded to oral argument before the Court of Appeals.

With jurisdiction based on 28 U.S.C. Section 1291 the Court of Appeals with another strong and vigorous dissent affirmed the District Court's denial of intervention and dismissed the appeal as to both the plaintiff class members, Murphy and Greenwood, and the proposed intervenors, Reed and Aughenbaugh.[28]

With jurisdiction based on 28 U.S.C. Section 1254(1) and 28 U.S.C. 2101(c) this Petition for Certiorari is being made to the Supreme Court of the United States.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Federal Constitutional Provisions

United States Constitution, Amendment V (in relevant part):

No person shall...be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment IX:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[28] *Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991)

United States Constitution, Amendment XIV (in relevant part):

No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Constitutional Provisions

Illinois Constitution of 1970, Article I, Section 1:

All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

Illinois Constitution of 1970, Article I, Section 2:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Illinois Constitution of 1970, Article I, Section 12:

Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain judgment by law, freely, completely, and promptly.

Illinois Constitution of 1970, Article I, Section 23:

A frequent recurrence to the fundamental principles of civil government is necessary to preserve the blessings of liberty. These blessings cannot endure unless the people recognize their corresponding individual obligations and responsibilities.

Illinois Constitution of 1970, Article I, Section 24:

The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State.

Illinois constitution of 1970, Article II, Section 1:

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Illinois Constitution of 1970, Article IV, Section 1:

The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives, elected by the electors from 50 Legislative Districts and 118 Representative Districts.

Illinois Constitution of 1970, Article V, Section 15:

The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.

State Statutes

Abortion Act

Ill.Rev.Stat., Ch. 38, Sec. 81-21:

(Section 1 of the Abortion Act)

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Su-

preme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling state interest in the infant and unborn child, to assure the integrity or marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed.

Ill.Rev.Stat., Ch. 38, Sec. 81-30.1:
(Section 10.1 of the Abortion Act)

Any physician who diagnoses a woman as having complications resulting from an abortion shall report, within a reasonable period of time, the diagnosis and a summary of her physical symptoms to the Illinois Department of Public Health in accordance with procedures and upon forms required by such Department. The Department of Public Health shall define the complications required to be reported by rule. The complications defined by rule shall be those which, according to contemporary medical standards, are manifested by symptoms with severity equal to or greater than hemorrhaging requiring transfusion, infection, incomplete abortion, or punctured organs. If the physician making the diagnosis of a complication knows the name or location of the facility where the abortion was performed, he shall report such information to the Department of Public Health.

Any physician who intentionally violates this Section shall be subject to revocation of his license pursuant to para-

graph (22) of Section 22 of the Medical Practice Act of 1987.

Ill.Rev.Stat., Ch. 38, Sec. 81-31.1(a) & (b):
Section 11.1 of the Abortion Act)

(a) The payment or receipt of a referral fee in connection with the performance of an abortion is a Class 4 Felony.

(b) For purposes of this Section, "referral fee" means the transfer of anything of value between a doctor who performs an abortion or an operator or employee of a clinic at which an abortion is performed and the person who advised the woman receiving the abortion to use the services of that doctor or clinic.

Ambulatory Surgical Treatment Center Act
Ill.Rev.Stat., Ch. 111 1/2, Sec. 157-8.1 et seq.
(Reproduced in 88-790 Appendix I)

Health Facilities Planning Act
Ill.Rev.Stat., Ch. 111 1/2, Sec. 1151 et seq.
(Reproduced in 88-790 Appendix J)

Medical Practice Act
Ill.Rev.Stat., Ch. 111, Sec. 4400-22
(Reproduced in 88-790 Appendix K)

State Regulations

Ambulatory Surgical Treatment Center Licensing Requirements
77 Ill.Adm.Code, Ch. 1, Sec. 205, Subch. b
(Reproduced in 88-790 Appendix L)

August 15, 1990 Amendments to Ambulatory Surgical Treatment Center Licensing Requirements
77 Ill.Adm.Code, Ch. 1, Sec. 205
(Reproduced in Appendix M)

STATEMENT OF THE CASE

On December 1, 1990 by joint motion *Turnock v. Ragsdale* (88-790) was deferred on the eve of oral arguments[29] without the terms of the settlement proposal being disclosed to the Supreme Court. Negotiations had produced a proposed consent decree which would reject, by permanent injunction, portions of the Ambulatory Surgical Treatment Center Act, the Health Facilities Planning Act and the Medical Practice Act, for all three trimesters of pregnancy.

The original preliminary injunction of the District Court in 1985, affirmed by the Court of Appeals in 1988, had limited the injunction of the Acts to the first and/or early second trimester of pregnancy. Neither the District Court in 1985 nor the Court of Appeals in 1988 had found the Acts unconstitutional for the law second and/or third trimesters of pregnancy. And the district Court in 1990 did not make any new finding of unconstitutionality as to any provisions of the Acts prior to or upon approving the settlement proposal.

The express statutory scheme duly enacted by the Illinois General Assembly has been permanently enjoined and rejected by the consent of members of the executive branch, administrative agencies and private citizens and by the orders of the District Court. No constitutional authority is cited by either the parties or the District Court for this rejection.

Moreover, at the fairness hearing certain allegations were made to suggest that the Illinois Attorney General had shattered any expectation that he would vigorously defend the state statutes. In contemporary news accounts both critics and supporters of the settlement proposal speculated that the Attorney General had been eager to resolve the case because it

[29] *Turnock v. Ragsdale*, 110 S.Ct. 532, 107 L.Ed.2d 530 (1989).

had become politically disadvantageous to him to allow the Supreme Court to decide the case. The District Court did not review the settlement proposal with the heightened level of scrutiny appropriate to these circumstances. The record and the opinion of the District Court so demonstrate.

The original statutory scheme of the Illinois General Assembly provided that all abortions in Illinois were to be performed in either ambulatory surgical treatment centers or hospitals. Under the settlement proposal any geographical location within the borders of Illinois can be an abortion site so long as it is not primarily used for surgical procedures. And these sites would be totally excluded from all state licensing requirements. All abortions performed at these sites would be outside of all state medical regulation.[30]

In addition, the settlement proposal refers to abortion clinics as Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers) and allows them to operate with their own separate--and less restrictive--standard of state medical regulation.[31] For example, abortionists scrubbing for surgery and janitors cleaning toilet scrub brushes can use the same sink. No statute duly enacted by the Illinois General Assembly authorized the creation of these centers. Ironically, before being enjoined and then rewritten, this same section, Section 205.710, stated simply that all abortions "shall be provided to the public with the same standards of safety, effectiveness, and regard for patients rights as any other health service."

The consent decree also establishes a judicial double standard approved by the federal judiciary. First, as noted,

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[30]Ill.Rev.Stat., Ch. 111 1/2, Sec. 157-8.3 is enjoined. See *Ragsdale v. Turnock*, 734 F.Supp. 1457, 1460 (N.D.Ill. 1990) at note 7.

[31]77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpt. G, Sec. 205.710 is reproduced in Appendix at A-95 to A-100. See *Ragsdale v. Turnock*, 734 F.Supp. 1457, 1460 (N.D.Ill. 1990).

some abortions sites are excluded from all state medical regulation and licensing requirements. Other sites are not excluded. The Ambulatory Surgical Treatment Center Act makes no such distinction. Second, portions of the Health Facilities Planning Act will not be enforced against Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers) but will be enforced against other surgical centers. The Health Facilities Planning Act makes no such distinction.[32] No statutory authority is cited by either the parties or the District Court to legalize this discriminatory enforcement.

The settlement proposal also effectively enjoins in part the enforcement of certain portions of the Abortion Act which were never pled in these proceedings, and the constitutionality of which was never challenged in these proceedings.

First, Section 10.1 requires a physician to report abortion complications to the Illinois Department of Public Health.[33] But the consent decree would enjoin the reporting of abortion complications by physicians at ambulatory surgical treatment centers.[34]

Second, Section 11.1 makes the payment or receipt of a referral fee in connection with the performance of an abortion a criminal offense.[35] But the consent decree would enjoin the referral fee prohibition for abortion counselors[36]

Petitioners Murphy and Greenwood are experienced emergency room nurses who have personally witnessed the medical and psychological complications, including suicidal

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[32]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1466-69 (N.D.Ill. 1990).

[33]Ill.Rev.Stat., Ch. 38, Sec. 81-30.1

[34]77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpart G., Sec. 205.760-Reports, in 88-790 Appendix at App. 223.

[35]Ill.Rev.Stat., Ch. 38, Sec. 81-31.1.

[36]77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpart G., Sec. 205.730(b)-Counseling, in 88-790 Appendix at page App. 221.

ideations, which can and do result from legal abortions. They are also members of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future. Upon learning of the terms of the settlement proposal, these petitioners personally concluded that the health and medical care of women seeking abortions had been illegally, unconstitutionally, and dangerously compromised. They filed timely written objections, personally appeared at the fairness hearing, and through counsel voiced their oral objections to the proposed consent decree.

The settlement proposal also effectively enjoined enforcement of Section 1 of the Abortion Act which acknowledges unborn children as human beings and which establishes the state personhood of unborn children.[37] In fact at no time is the personhood of the unborn child in Illinois either acknowledged or considered by the District Court.

First, the consent decree allows abortion procedures to be performed outside of ambulatory surgical treatment centers and hospitals in sites least able to protect the life and liberty interests of an unborn child.[38]

Second, future regulations are restricted to health and safety concerns for the woman and by permanent injunction cannot include health and safety concerns for the unborn child.[39]

Third, Pregnancy Termination Specialty Centers, or PTSC's, can perform abortions on a woman with an unborn child of 18 weeks gestational age. In the future the District Court may allow an unborn child of higher gestational age to be destroyed at a PTSC based solely upon health and safety

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[37]Ill.Rev.Stat., Ch. 38, Sec. 81-21.

[38]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1466 (N.D.Ill. 1990).

[39]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1469 (N.D.Ill. 1990).

concerns for the mother. The health and safety of the unborn child by permanent injunction is not to be considered.[40]

Petitioners Reed and Aughenbaugh, as expectant fathers of unborn children, concluded that the consent decree illegally, unconstitutionally, and dangerously compromised the health, safety, life and liberty interests, and the very personhood of their unborn children. They filed their written objections through their Petition to Intervene, personally appeared at the fairness hearing, and through counsel voiced their oral objections to the proposed consent decree.

The District Court's March 22, 1990 order, approving the settlement proposal and entering the consent decree, acknowledged that the "consent decree introduces a new scheme" and recognized that "the settlement creates a network of statutes and rules regulating the provisions of abortion services."[41] The new rules and medical regulations integral to this newly created organic statutory scheme were formally adopted on August 15, 1990.[42]

The District Court's March 22, 1990 order is silent as to the Illinois Constitutional provisions which provide for a clear separation of power between the executive and legislative branch and which vest all legislative authority in the Illinois General Assembly. The order is also silent as to other Illinois Constitutional provisions which allow the unborn child to protect her rights and which mandate the courts to allow her to do so.

Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh filed separate appeals which were

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[40]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1470 (N.D.Ill. 1990).

[41]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1460-61 (N.D.Ill. 1990).

[42]The new regulations formally adopted on August 15, 1990 are reproduced in Appendix at A-80 et seq.

consolidated pursuant to the order of the Court of Appeals.[43] Petitioners Reed and Aughenbaugh also included in their appeal the denial of their Petition to Intervene.[44]

Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh then filed a Petition For Certiorari Before Judgment. At that time the case had been in various levels of the federal judiciary for five years. Moreover, the Petitioners felt that the case presented questions of imperative public importance. And the Court had previously recognized the exceptional importance of *Turnock v. Ragsdale* (88-790).[45]

On December 3, 1990 the Court denied the Petition For Certiorari Before Judgment.[46] On December 4, 1990 the Court of Appeals heard oral arguments and on August 20, 1991 rendered its ruling.[47] The Court of Appeals with a strong and vigorous dissent ruled in a plurality opinion that the District Court was to be affirmed. Judge Posner and Judge Flaum both agreed that the settlement proposal was of questionable legality. However, since Judge Posner ruled that no one had standing to appeal, the constitutionality of the illegal settlement could not be effectively challenged.

Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh now Petition this Court for the relief they have been denied to date. They have filed their present Petition for Certiorari. They realize that this Court has already found *Turnock v. Ragsdale* (88-790) to be of exceptional importance. They pray that this Court will still find it so.

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[43]The May 21, 1990 and June 7, 1990 orders of consolidation are reproduced in Appendix at A-73 and A-75, respectively.

[44]The April 20, 1990 and May 18, 1990 Notices of Appeal of Petitioners Reed and Aughenbaugh are reproduced in Appendix at A-69 and A-71, respectively.

[45]*Turnock v. Ragsdale*, 109 S.Ct. 3239, 106 L.Ed.2d 587 (1989).

[46]*Murphy v. Ragsdale*, 111 S.Ct. 568, 112 L.Ed.2d 574 (1990).

[47]*Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991).

SUMMARY OF ARGUMENT
Murphy v. Ragsdale
Is Of Exceptional Importance

The Illinois General Assembly enacted statutes to assure the safety of medical care, to safeguard the health of the public, and to contain the rising costs of medical care. Abortion and abortion-related medical services were only one of the health care services to be regulated. At that time both pro-choice and pro-life advocates and legislators supported regulation of the abortion industry. In Illinois women were suffering preventable and unnecessary injuries at the hands of abortionists. Some women even died. It was a disgrace--covered extensively by the print media.

In 1985 the District Court enjoined the enforcement of essentially the entire regulatory scheme for the first and early second trimester of pregnancy. The ruling, affirmed by the Court of Appeals, was based upon the limitations *Roe v. Wade* imposed upon legislative enactments.

In a vigorous dissent Judge Coffey pointed to the stated legislative intent and the extensive legislative history which surround the enactments.

Ironically, the main argument against the statutory scheme was cost even though Dr. Ragsdale himself testified to de minimus cost increases and other testimony disclosed that by raising the standard of medical care found in the abortion industry to the medical standard of other out-patient surgeries, abortions which previously had been performed in hospitals could safely be performed in Ambulatory Surgical Treatment Centers at a substantial cost savings to the patient.

When the Court agreed to hear *Turnock v. Ragsdale,* many thought that the Court would give the State some lati-

tude in their legislative enactments. Medical care could be effectively regulated to assure health and safety. Then the case was deferred for settlement. A properly negotiated settlement within constitutional guidelines could have been helpful even then. But as Judge Posner noted, the statutes were gutted and precious little was left. Political expediency triumphed over the health and safety of women.

On its face the settlement is an insult to women. To think that janitors cleaning toilets and doctors scrubbing for surgery use the same sinks is plain filth. No respectable animal rights group would allow a veterinarian to do the same.

The Court of Appeals saw the problem. Judge Posner and Judge Flaum both saw the illegality and the political impropriety. But the Court of Appeals denied standing by redefining the legislative intent of years of legislative enactments which regulated a whole host of out-patient surgeries and other medical treatments. A majority concluded that the entire statutory scheme was designed exclusively by the Illinois General Assembly to make abortions more expensive.

In the five year judicial history of the *Ragsdale* case State sovereignty has been compromised, legislative intent and history have been passed over, and the health of women is still at risk. The whole process is reminiscent of the Vietnam era cartoon with a general over a village which is utterly destroyed. He states quite simply, "We had to destroy it to save it." Just how many women are going to have to suffer before its becomes obvious to all that they too are the victims.

We are not attempting to enforce the law. We are not prosecutors. Both Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh are merely appealing a settlement which illegally and unconstitutionally rewrites statutes which were enacted to safeguard our respective interests. Thus, we submit our Petition for Certiorari to the Court.

ARGUMENT ONE:
Petitioners Murphy and Greenwood Have Standing To Appeal

The Court of Appeals correctly observed that two purported members of the plaintiff class objected to the consent decree and have appealed. Both Ritaellen M. Murphy, R.N., and Penny R. Greenwood, R.N., timely filed their written objections to the proposed agreement by the February 13, 1990 deadline set by the order of the District Court. On February 23, 1991 the District Court conducted a fairness hearing at which time the lawyer for the plaintiff class members Murphy and Greenwood was allowed to speak. After reviewing the record in the District Court, the Opinion of the Court of Appeals correctly concluded that: "All of the objections argued on appeal appear to have been raised."

The Court of Appeals correctly noted that Appellants Murphy and Greenwood objected to the medical health of Illinois women being compromised. And further objected that "when the constitutionality of a state statute is at issue, it is improper for a federal court to issue a consent decree against enforcement upon the consent of the Attorney General and other members of the executive department, and that defendants have, in effect, re-written the statutes."

A. The Court of Appeals denied standing by holding that the settlement was "too favorable"

The Court of Appeals erroneously held that Appellants Murphy and Greenwood had no standing to make any objections in their capacity as members of the plaintiff class since, in the opinion of the Court of Appeals, these "arguments are offered in support of the claim that the decree is too favorable to plaintiffs."

The key to the error of the Court of Appeals is found in

the words "too favorable" and in the Court of Appeals erroneous conclusion that all of the statutes at issue were adopted to make abortions more expensive.

The concurring opinion of Judge Posner agreed with the finding of Judge Fairchild that "the women's appeal from the consent decree must be dismissed because they lack standing to appeal even though they were parties in the district court."

B. To hold that the settlement was "too favorable" the Court of Appeals had to redefine legislative intent

The concurring opinion of Judge Posner amplified the Opinions of the Court by stating that the "consent decree guts a statute that was (to speak realistically) designed to limit the number of abortions performed in Illinois by making abortions more expensive."

C. By redefining legislative intent, no one can possibly be harmed by the settlement

Erroneous presumptions lead to erroneous conclusions. For example, since the statutes have been "gutted", any potential increase in abortion expense has been eliminated, and no harm remains to be litigated. Thus, the Appellants Murphy and Greenwood become merely ideological litigants. Since "an affront to one's ideology is not an interest that will support standing to sue," Appellants Murphy and Greenwood have no standing to appeal.

However, if the statutory scheme duly enacted by the Illinois General Assembly was not to make abortions more expensive, then this entire reasoning fails. Like so many blocks, if foundation blocks are removed the whole pile will coming tumbling down.

D. Legislative intent clearly encompassed health and safety and the control of medical costs

Judge Flaum's dissent does make mention of the legislative history of the Illinois statutory scheme. However, the true emphasis and clarity of his dissent is his analysis of the changes in abortion law, the impropriety of the behavior of the parties, and the inappropriateness of the settlement, both from the standpoint of what the court should have done and also what the parties should not have done.

The most thorough judicial discussion of legislative intent and legislative history on point can be found in Judge Coffey's excellent dissent in *Ragsdale v. Turnock*, 841 F.2d 1358 (1988). In addition, several amicus filings in *Turnock v. Ragsdale* (88-790) are quite enlightening. The most informative is entitled: "Brief of Certain Illinois Senators and Representatives as Amici Curiae in Support of Appellants."

The members of the Illinois General Assembly who filed their Brief also had the foresight to file copies of the *Sun-Times* series, "The Abortion Profiteers." As the oldest pending file, the *Turnock v. Ragsdale* (88-790) briefs are located just inside the Clerk's file storage room in the first open cabinet to the right and take up the top few shelves. The *Sun-Times* articles are the only oversized filing in the amici section. The articles are 11 by 8 1/2. Ironically, Arnold Bickham, one of the abortion providers mentioned in the *Sun-Times* expose was just convicted of an abortion-related felony in Cook County, Illinois, on November 4, 1991. The *Sun-Times* had the story once again. *Chicago Sun-Times*, November 5, 1991 at page 10, columns 4 and 5.

Since the evidence is overwhelming that the statutes were adopted for health and safety and to control medical expense, then the "gutting" of the statutes is a harm. Appellants Murphy and Greenwood do have standing. And the illegality

of a consent decree which in Judge Posner's words "preserves very little of the statute" can be addressed on appeal.

E. Majority of the Court of Appeals concluded that the settlement was illegal

Ironically, a majority of the Court of Appeals did hold that the proposed settlement was illegal. As Judge Posner stated, "Judge Flaum is rightly concerned with the district court's failure to probe the adequacy of the settlement embodied in the consent decree that the court approved." And Judge Flaum concluded his dissent by stating that: "In this case, the district court was faced with a changing body of law concerning permissible regulation of abortion and a state officer whose motivations in settling this case were questioned at the fairness hearing and elsewhere. These circumstances demanded a more searching examination of the fairness of the consent decree the parties arrived at than the district court provided. I respectfully dissent."

But although Judge Posner recognized the illegality he did not join with Judge Flaum in forming a majority. For Judge Posner believed that there was "no one before us who is entitled to challenge the consent decree." When Judge Fairchild and Judge Posner redefined the legislative motives and purposes of the statutes as clearly expressed by the Illinois General Assembly, they changed the outcome of the suit and enabled the District Court to approve an illegal settlement.

If the majority's view of standing is to be adopted, the plaintiff class of women of child-bearing age who desire or may desire an abortion sometime in the future received notice of the fairness hearing as a matter of form over substance. For what fairness occurs when an illegal settlement cannot be appealed from by members of a class which is a party to the litigation?

ARGUMENT TWO:
The District Court Lacked Subject Matter Jurisdiction To Enter A Consent Decree Outside Of Its Inherent Power

A. The Illinois General Assembly is the exclusive legislative body in the State of Illinois

Illinois has long recognized a separate and distinct separation of powers between the legislative, executive and judicial branches.[48] The legislative power is vested exclusively in the General Assembly. Only the General Assembly can constitutionally enact statutes.[49] On common-law principles, as well as settled constitutional law, this legislative power cannot be delegated to another body, authority or person.[50] Only the Illinois General Assembly can legislate.

1. The Illinois Attorney General cannot legislate in the State of Illinois

The Illinois Attorney General, as the legal officer of the State of Illinois, is a member of the executive branch and is constitutionally prohibited from exercising the powers of the legislative branch.[51] Thus, the representations of the Attorney General are not binding on the courts and legislature of the State of Illinois.[52] The Attorney General cannot reject legislation, or hold particular statutes to be unconstitutional, or otherwise be the binding determinator of duly enacted statutes.[53] The Illinois Attorney General simply cannot legislate for the Illinois General Assembly.

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[48]Illinois Constitution of 1970, Article II, Section 1.
[49]Illinois Constitution of 1970, Article IV, Section 1.
[50]*People v. Tibbitts*, 56 Ill.2d 56, 305 N.E.2d 152, 155 (1973).
[51]Illinois Constitution of 1970, Article II, Section, and Article V, Section 15.
[52]*Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).
[53]*National Revenue Corporation v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986).

2. No State's Attorney, including the Cook County State's Attorney, can legislate in the State of Illinois

The Cook County State's Attorney is a member of the county executive branch with the Cook County Board serving as the county legislative branch. Any state's attorney, including the Cook County State's Attorney, is not authorized to act for the county board. If he does, his actions will be judicially held to be void ab initio.[54] The judicial designation of the Cook County State's Attorney as class representative for all Illinois State's Attorneys does not create constitutionally recognized legislative authority. If the Cook County State's Attorney cannot legislate for the Cook County Board, he certainly cannot legislate for the Illinois General Assembly.

3. Illinois administrative agencies cannot legislate in the State of Illinois

The Department of Public Health, the Department of Professional Regulation, and the Ambulatory Surgical Treatment Center Board are all Illinois administrative agencies. These agencies have no greater powers than those conferred upon them by the legislation creating them.[55]

The Illinois General Assembly in delegating to these agencies the performance of certain functions may not invest them with arbitrary powers and cannot constitutionally delegate to administrative agencies the power to legislate.[56] Moreover, Illinois administrative agencies have no authority to adopt administrative regulations inconsistent with the express statu-

[54] *Will County v. Georg*, 103 Ill.App.3d 1016, 59 Ill.Dec. 264, 431 N.E.2d 765 (1982).

[55] *Village of Lombard v. Pollution Control Board*, 66 Ill.2d 503, 6 Ill.Dec. 867, 363 N.E.2d 814, 815 (1977).

[56] *People v. Tibbitts*, 56 Ill.2d 56, 305 N.E.2d 152, 155 (1973).

tory enactments of the Illinois General Assembly. Quite clearly, no Illinois administrative agency can legislate for the Illinois General Assembly.

B. The District Court exceed the limits of its judicial authority in approving the settlement proposal

The wisdom or the lack of wisdom of a regulatory enactment is for the Illinois General Assembly to determine, and whether it is the best means to achieve the desired results, and whether the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the Illinois General Assembly. The honest conflict of serious opinion does not suffice to bring these matters within the range of judicial cognizance.[57] Such is the mistake of the District Court in the instant case.

1. The District Court failed to ascertain that the parties lacked the authority to consent to the proposed settlement

A consent decree's force comes from agreement rather than positive law. The validity of the consent decree depends upon the parties' authority to give assent. The District Court in the instant case should not have allowed itself to be deceived by consenting parties who acted as though they had authority when they have none. That the parties would so deceive the District Court is reprehensible.

All District Courts must be on the lookout for any such attempts to use consent decrees to make end runs around the Illinois General Assembly, for the sovereign legislative power

[57] *Chicago Allis Mfg. Corp. v. Metropolitan Sanitary District of Greater Chicago*, 52 Ill.2d 320, 288 N.E.2d 436, 441 (1972).

constitutionally vested in the Illinois General Assembly is consistent with the federal Constitution which does not require a specific separation or allocation of powers within any state government. Thus, debate as to the wisdom of the allocation of powers within any state government is foreclosed to the federal judiciary.[58]

a. The Illinois Attorney General and the Cook County State's Attorney both acted without authority

The District Court should have discovered the lack of authority of both the Illinois Attorney General and the Cook County State's Attorney. Some rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government to engage in certain acts. They may chafe at these restraints and seek to evade them. If they do, the officeholders have acted without authority, as they have done here.[59]

b. All of the Illinois administrative agencies acted without authority

The District Court should have discovered the lack of authority of the Department of Public Health, the Department of Professional Regulation, and the Ambulatory Surgical Treatment Center Board. A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them, as they attempted here.[60]

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[58] *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 469 (7th Cir. 1988).

[59] *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986).

[60] *Kasper v. Board of Election Commissioners of the City of Chicago*, 814 F.2d 332, 341-42 (7th Cir. 1987)

A District Court should not stray from its judicial province and enter an order which permits administrative agencies to engraft their own notions outside of express statutory authority. Yet, this is exactly what the District Court did in the instant case.[61]

c. All of the private citizens who negotiated the settlement acted without authority

The District Court should have recognized that the private citizens, such as Dr. Ragsdale, simply have no authority at all. If they did, then other citizens with other beliefs or causes would have the authority too. Pornographers could join with the Illinois Attorney General and rewrite obscenity statutes. Polluters could join with the Illinois Attorney General and rewrite environmental statutes. Private citizens do not legislate for the State of Illinois. The Illinois General Assembly does.

ARGUMENT THREE:
The Denial of Intervention was Prejudicial To the Rights of the Unborn Children

When Dr. Ragsdale filed his suit in 1985 the focus of his case was the constitutional validity of certain Illinois statutes and regulations as they related to women who might chose to abort their children. Unborn children were not potential parties, nor could they have been for unborn children had no right to life under Illinois law. As the proceedings went from the District Court to the Appellate Court and finally to the Supreme Court unborn children were still not proper parties.

[61] *Vermont Yankee Nuclear Power Corp v. National Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

Then in the summer of 1989 the Court rendered its decision in *Webster v. Reproductive Health Services.* For the first time since the Court rendered its decision in *Roe v. Wade,* unborn children became persons with the right to life under Illinois law. This occurred since Section 1 of the Illinois Abortion Act provides that unborn children are persons, and that once the Court's decisions in *Roe v. Wade* and *Doe v. Bolton* are ever modified or reversed, then the former policy of the State of Illinois "to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated."

And the Illinois Constitution of 1970, Article I, Section 12, provides a remedy to every person for injuries and wrongs which he receives to his person. The unborn children should be allowed to intervene to be provided that remedy.

Judge Posner acknowledged the personhood of Illinois unborn children for purposes of intervention. And certainly, since the statutes had been gutted and the Illinois Attorney General had abandoned the interests of the unborn children, the argument for intervention was strong. However, Judge Posner concluded that the unborn children could not be allowed to intervene for they were attempting to enforce the statutes.

This is simply not the case. Even if all of the statutes at issue were enacted exclusively for the benefit of the unborn children, they cannot assume enforcement responsibilities. Private citizens have no such authority. Only the executive branch of the State of Illinois has such authority.

However, the unborn children can intervene to stop the parties from illegally and unconstitutionally compromising the rights which unborn children now do have under Illinois law. It is the illegal actions of the parties that give rise to the basis for the right to intervene.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Of Counsel

91-808 (2)

No.

In The
Supreme Court of the United States
October Term, 1991

RITAELLEN M. MURPHY, R.N., et al.,

Petitioners,

vs.

RICHARD M. RAGSDALE, M.D., et al.,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

APPENDIX TO CERTIORARI PETITION

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APPENDIX TO CERTIORARI PETITION

APPENDIX A

(ARGUED DECEMBER 4, 1990—DECIDED AUGUST 20, 1991)

IN THE UNITED STATES COURT OF APPPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

Nos. 90-1907, 90-1908, 90-2122 and 90-2123

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 85 C 6011 - John A. Nordberg, Judge

Before POSNER and FLAUM, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

FAIRCHILD, *Senior Circuit Judge*. The party class representatives in this case moved for approval of a proposed settlement and consent decree, and the district court granted their motion. Plaintiffs had challenged statutes relating to abortion. After the parties reached an agreement, two expectant fathers representing the interests of fetuses moved to intervene as of right. The district court denied their motion, and they have appealed. Also, two purported members of the plaintiff class objected to the consent decree and have appealed.

BACKGROUND

This case concerns the constitutionality of certain Illinois laws having an impact on the performance of abortions. The plaintiffs sue on behalf of a class of physicians who perform or desire to perform abortions in Illinois and on behalf of a class of women who may desire abortion services. The defendants are various officers of the executive branch: the Director of the Illinois Department of Public Health, the Attorney General, the Director of the Department of Registration and Education, and the State's Attorney of Cook County who defends on behalf of a class consisting of the State's Attorneys of Illinois.

The plaintiffs filed this suit on June 28, 1985. They challenged three Illinois statutes and numerous regulations. They originally asked the district court "to enjoin defendants from enforcing, in derogation of a physician's right to perform, and a woman's right to obtain, first and early second trimester abortions, three Illinois statutes: (1) Section 16(1) of the Illinois Medical Practice Act ("MPA"), Ill. Rev. Stat. ch. 111, para. 4433(1) [now para. 4400-21(1)(a)-(e)]; (2) the Ambulatory Surgical Treatment Center Act of Illinois ("ASTCA"), Ill. Rev. Stat. ch. 111½, para. 157-8.1-157-8.16, and the regulations promulgated thereunder; and (3) the Illinois Health Facilities Planning Act ("HFPA"), Ill. Rev. Stat. ch. 111½, para. 1151-1168, and the regulations promulgated thereunder." *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1215 (N.D. Ill. 1985).

"Essentially, section 16(1) [of the MPA] prohibits physicians from performing even one abortion in their offices, and requires physicians who wish to provide abortion services in non-hospital environments to comply with the ASTCA and the HFPA." *Id.* at 1216.

The ASTCA provides for licensure of all ambulatory surgical treatment centers (ASTCs) with regulations which, in effect, "require ASTCs to be the functional equivalent of small hospitals." *Id.* The HFPA requires all ASTCs to obtain a certificate of need. *Id.*

Upon finding that plaintiffs had established the burden-

some nature of the scheme as a whole, and that defendants had failed to establish a compelling basis for it, the district court enjoined defendants, *pendente lite*, "from enforcing the challenged statutes and regulations against any plaintiff offering, performing, or desiring to offer or perform a first or early second trimester abortion." *Id.* at 1231.

This court affirmed (by a divided panel) with one exception. The portion of the injunction against enforcement of the "second trimester hospitalization requirement" was vacated as moot. *Ragsdale v. Turnock*, 841 F.2d 1358, 1376 (7th Cir. 1988). The basis for the exception was that "the defendants have conceded, at least since 1983, that this requirement is unconstitutional under governing Supreme Court decisions and is therefore not enforced." *Id.* at 1365.

In affirming, this court noted that although "there may well be facets of the statute and regulations which would individually pass muster . . . we are constrained to affirm the district court's injunction of the scheme as a whole." In response to a request for severance of unconstitutional portions, the court indicated its inability to untangle the constitutional from the unconstitutional provisions. *Id.* at 1375.

Defendants filed a Notice of Appeal, seeking review by the United States Supreme Court. On July 3, 1989, the Supreme Court entered an order accepting the case for oral argument but postponing the question of jurisdiction until the hearing on the merits. *Turnock v. Ragsdale*, 492 U.S. 916 (1989). Oral argument was scheduled for December 5, 1989, but on November 22, 1989, the parties filed a joint motion to defer further proceedings in the Supreme Court pending submission of the proposed Consent Decree to the district court for approval. The Court granted the parties' joint motion. *Turnock v. Ragsdale*, 110 S. Ct. 532 (December 1, 1989).

The consent decree, unlike the preliminary injunction, is not a blanket prohibition of enforcement of the statutes

at issue; it allows some regulation affecting abortions performed during the first half of pregnancy. Understanding the entire decree requires careful attention to details, and we see no reward in attempting a summary or detailed description here. For the terms of the decree and the observations of the district court concerning it, see *Ragsdale v. Turnock*, 734 F. Supp. 1457, 1460-62, 1466-70 (N.D. Ill. 1990). The defendants claim that the decree benefits the state:

> The decree has, for the first time since November 27, 1985, reinstated DPH's authority to regulate outpatient surgical facilities to the extent they perform abortions. Prior to the entry of the decree, the IDPH had been enjoined from exercising its statutory authority to license, regulate, and inspect such facilities. Clearly, the decree furthers the IDPH's interests in ensuring that surgical procedures, including abortions, be performed under circumstances ensuring maximum safety.

Brief of defendants-appellees at 14-15.

Because this case is a class action, the settlement could not be effective until all members of the classes were notified and it was approved by the district court. Fed. R. Civ. Pro. 23(e). The district judge conducted a fairness hearing (after notice, including publication) at which all class members were permitted to appear. All objectors to the proposed settlement were initially required to submit their responses by February 13, 1990. On February 13, Kenneth M. Reed and Mark I. Aughenbaugh as next friends of unborn children moved to intervene on behalf of "a class consisting of all Illinois unborn babies." On February 22, the district court denied the motion to intervene, but allowed the proposed intervenors to submit briefs as *amici curiae*.

Overall, the district court received 326 telephone calls, 2 telegrams, and 1266 letters, and the judge reviewed all of the submissions. On February 23, 1990, the district court conducted a fairness hearing. At the hearing, the

court heard objections from *amici* who had filed briefs with the court and also allowed anyone attending the hearing to speak. The lawyer for the Murphy and Greenwood plaintiff class members and the proposed intervenors was allowed to speak. All of the objections argued on appeal appear to have been raised. On March 22, 1990, the district court approved the consent decree. *Ragsdale v. Turnock*, 734 F. Supp. 1457 (N.D. Ill. 1990).

The appellants challenge both the refusal of the district court to allow the intervention of parties representing the interest of fetuses and the decision of the district court that the consent decree is lawful, reasonable, fair, and adequate.

INTERVENTION

The "petition to intervene and to maintain a class action of baby Reed and baby Aughenbaugh" was filed February 13, 1990, the last day initially set by the district court for filing objections to the proposed settlement. The petition was made as next friends by Kenneth Reed and Mark Aughenbaugh. They alleged their wives were pregnant, but did not allege any threat of abortion. The gestational age was not alleged, although that fact was material to any impact the consent decree could have on them. The petition invoked Rule 24(a)(2) of the Federal Rules of Civil Procedure, but was not, as required by Rule 24(c), "accompanied by a pleading setting forth the claim or defense for which intervention is sought."

Rule 24(a) does not require that an applicant must be permitted to intervene where "the applicant's interest is adequately represented by existing parties." Judge Nordberg orally denied the petition but granted Mr. Reed and Mr. Aughenbaugh leave to appear as *amici curiae*. His principal reason was that the objectors had not shown that the state had not adequately protected the interest of the fetuses. *Ragsdale*, 734 F. Supp. at 1459 n.4. The author of this opinion agrees that the petition failed to make this showing.

Rule 24 also requires that the application be timely. Timeliness requires a consideration of all the circumstances of a case and not just the point to which the suit has progressed. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). This court has required that in determining timeliness under the totality of the circumstances, four factors should be considered:

> (1) the length of time the intervenor knew or should have known of his or her interest in this case, (2) the prejudice to the original party caused by the delay, (3) the resulting prejudice to the intervenor if the motion is denied, and (4) any unusual circumstances.

South v. Rowe, 759 F.2d 610, 612 (7th Cir. 1985).

The prejudice to the present parties of a grant of intervention (factor 2) is obvious and substantial. After pursuit of litigation for several years, they expended great effort in working out a settlement to which the proposed intervenors are opposed. Once parties have invested time and effort into settling a case it would be prejudicial to allow intervention. *Farmland Dairies v. Commissioner of the New York State Dept. of Agriculture and Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988); *City of Bloomington v. Westinghouse Electric Corp.*, 824 F.2d 531, 535 (7th Cir. 1987) ("intervention at this time would render worthless all of the parties' painstaking negotiations because negotiations would have to begin again and [the intervenor] would have to agree to any proposed consent decree"); *Jones v. Caddo Parish School Bd.*, 735 F.2d 923, 935 (5th Cir. 1984). A case may never be resolved if another person is allowed to intervene each time the parties approach a resolution of it. *United States v. City of Chicago*, 908 F.2d 197, 199 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 783 (1991). This court has held that once complex settlement negotiations that are well publicized begin parties may not be allowed to intervene. *City of Bloomington*, 824 F.2d at 535.

Prejudice to the intervenors (or other members of the

proposed class) if intervention is denied (factor 3) is problematic at best. The existing preliminary injunction would presumably remain in effect if intervention were granted, and the litigation would presumably continue before the Supreme Court to resolve the reserved question of jurisdiction and the merits of the preliminary injunction if jurisdiction were found. The intervenors (and the class member appellants) apparently believe that this case is one in deciding which the Supreme Court might overrule *Roe v. Wade*, 410 U.S. 113 (1973), and thus permit greater state regulation (or prohibition) of abortions. That this hope is precarious is emphasized by the fact that the Supreme Court initially postponed consideration of its own jurisdiction of this case and later granted the motion of the parties to defer proceedings pending submission of the proposed consent decree to the district court for approval.

The motion to intervene does not demonstrate the length of time Mr. Reed or Mr. Aughenbaugh knew of their wives' pregnancies, of this action, or of the proposed consent decree (factor 1). This action was begun in 1985. The Attorney General's willingness to compromise became public knowledge by November 22, 1989.

We see no unusual circumstances (factor 4) significantly supporting intervention. The state officers who are defendants vigorously defended against the challenges within the bounds of existing law and court decisions. They began to work out a settlement by consent decree only after the district court granted a preliminary injunction finding a likelihood, if not certainty, that plaintiffs' challenges would succeed, and this court affirmed (except for a portion as to which the case was deemed moot because enforcement was withheld in recognition of unconstitutionality). Although the courts recognized that the issue at the preliminary injunction stage pertinent to constitutionality was whether plaintiffs have shown a better than negligible likelihood of success, *Ragsdale*, 841 F.2d at 1366 n.6; *Ragsdale*, 625 F. Supp. at 1224, the language of both the district court opinion and the majority opinion in this court seems to indicate conviction that the statutes are

unconstitutional if fully applied.[1]

The General Assembly is left free to enact new statutes or to amend the present statutes at any time and for any reason. *Ragsdale*, 734 F. Supp. at 1461 nn.10 & 11. Also, the consent decree provides for changes in regulations based upon changes in medical or scientific knowledge and for the right to ask the court to modify the gestational age upon which certain provisions of the consent decree depend based upon further development of medical or scientific knowledge. *Id.* at 1469-70.

The author of this opinion concludes the application for intervention was not timely and would affirm for that reason as well. Additionally, Judge Posner (post at 19) may be correct in reliance on *Diamond v. Charles*, 476 U.S. 54 (1986), as establishing that denial of intervention should be affirmed because the proposed intervenors lack standing, although *Diamond* dealt with a physician's conscientious objection to abortion, and the case was in a somewhat different procedural posture.

OBJECTORS MURPHY AND GREENWOOD

All four appellants appeared by one counsel and filed a single brief. No distinction is made between arguments raised on behalf of proposed intervenors, Reed and Aughenbaugh, and those on behalf of members of the plaintiff class, Murphy and Greenwood (Illinois women of child

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[1] We see nothing in recent Supreme Court opinions thought to limit the doctrine of *Roe v. Wade*, 410 U.S. 113 (1973), affecting the statutes challenged in this case. *Rust v. Sullivan*, 59 U.S.L.W. 4451 (U.S. May 23, 1991) (government may constitutionally prohibit dissemination of information concerning abortion at clinics which accept government funds); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) (parental notification statute partially constitutional and partially unconstitutional); *Ohio v. Akron Central for Reproductive Health*, 110 S. Ct. 2972 (1990) (parental notification statute constitutional); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (restriction on abortions in public facilities and viability testing requirement are constitutional).

bearing age who desire or may desire an abortion sometime in the future).

Most of the arguments in the brief attack the doctrine of *Roe v. Wade*, 410 U.S. 113 (1973), and are consistent with the position urged by the proposed intervenors on behalf of unborn children. These arguments, and others which concern only the interests of unborn children, are not properly before us and will not be addressed.

Appellants Murphy and Greenwood also make some arguments that are at least facially grounded on a woman's interest in protection of her health if she sought to have an abortion. One portion of appellants' brief argues, "The medical health of the women of child bearing age of the State of Illinois has been compromised . . . ." Appellants' Brief at pp. 46-48.

This is an argument that the consent decree is too favorable to the plaintiffs because it goes too far in enjoining enforcement of portions of the statutes and regulations. Appellants Murphy and Greenwood may individually believe in this argument, but they have no standing to make it in their capacity as members of the plaintiff class.

There are other arguments in the brief challenging the propriety of the consent decree, *i.e.*, that when the constitutionality of a state statute is an issue, it is improper for a federal court to issue a consent decree against enforcement upon the consent of the Attorney General and other members of the executive department, and that defendants have, in effect, re-written the statutes. It is sufficiently clear that these arguments are offered in support of the claim that the decree is too favorable to plaintiffs, and appellants Murphy and Greenwood therefore have no standing to make them as members of the plaintiff class.

Thus, there is no party before this court with standing to challenge questions of propriety of the settlement.

Accordingly, we AFFIRM the district court's denial of intervention, and DISMISS the appeals of the proposed intervenors and appellants Murphy and Greenwood.

POSNER, *Circuit Judge*, concurring in the opinion in part, and in the judgment. Judge Flaum is rightly concerned with the district court's failure to probe the adequacy of the settlement embodied in the consent decree that the court approved. But Judge Fairchild and I believe that there is no one before us who is entitled to challenge the consent decree, because the denial of the motion to intervene by the two fathers of fetuses must be affirmed and the women's appeal from the consent decree must be dismissed because they lack standing to appeal even though they were parties in the district court. On the first issue, however—the propriety of the denial of intervention to the fathers—Judge Fairchild's and my grounds differ, while on the second (with which I shall begin) I write in amplification of his discussion.

The female appellants, being Illinois women of child-bearing age, are members of the plaintiff class because it is defined as "all Illinois women of child-bearing age who desire *or may desire an abortion sometime in the future*" (emphasis added). Members of a class whose rights will by operation of res judicata be extinguished by the settlement of the class action of course have standing to object to the settlement and to press their objections on appeal, but like other litigants they must show that the order to which they object actually harms them. Ordinarily the harm arises from the fact that the settlement does not provide the class with as much relief as the objecting member had wanted. He claims that the named plaintiffs prematurely and excessively bargained away his rights. That is not the objection of the female appellants in our case. Their objection is the opposite: that the settlement is too favorable to the plaintiff class. Like the would-be intervenors, these women oppose abortion and want the statute enforced *à outrance*. To object to a settlement on the ground that you shouldn't have done as well in the settlement as you did identifies you as an ideological litigant; and an affront to one's ideology is not an interest that will support standing to sue. *Diamond*

v. Charles, 476 U.S. 54, 66-67 (1986); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982); *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

Maybe the class was misdefined, and women who, though of child-bearing age, are opposed to the availability of inexpensive abortions should not have been included because they lack the relevant community of interest with women who consider themselves harmed by the statute. If the female appellants had not been members of the class they would have had to seek leave to intervene in the lawsuit, like the men, *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 499 (3d Cir. 1982), and their claim to intervene would have fared no better than the men's. But even if the class was properly defined to include these women, which would make them parties in the district court without their having to intervene, a member of a class does not have standing to challenge a settlement that favors him in a tangible sense, though it offends him in an ideological sense. No one has such standing.

Because the women lack standing to maintain this appeal even though by virtue of being class members they were entitled to the rights of parties in the district court, it is critical to the maintenance of the appeal to decide whether the men should have been allowed to intervene in the district court either to represent the interests of the fetuses affected by the consent decree or to represent their own interests as fathers of such fetuses. Judge Fairchild believes that these would-be intervenors had failed to show that the State of Illinois is an inadequate representative of the fetuses who will be affected by the consent decree and therefore had failed to satisfy an essential requirement of Rule 24(a)(2) of the Federal Rules of Civil Procedure for intervention as a matter of right. I have my doubts, as I also do about Judge Fairchild's alternative ground for upholding the denial of intervention—that the motion to intervene was untimely. On November 22, 1989, the named plaintiffs and the Illinois attorney general jointly requested the Supreme Court to postpone oral argu-

ment pending the submission of a proposed consent decree to the district court. The district judge fixed February 13, 1990, as the deadline for submitting objections to the decree. The motion to intervene was filed that day. The timing is suspicious. It may well indicate a desire to disrupt the schedule that the judge had set for consideration of the proposed decree. Yet the motion was filed only three months or so after the movants first learned (sometime in November) that the attorney general had decided in effect to throw in the towel. It is true that this was years after the suit had been brought. But a motion for intervention filed back then would have been dismissed out of hand. There was every reason to expect the Attorney General of Illinois to defend the statute as vigorously as he could. It was not until November of 1989 that this expectation was shattered. The petition for intervention was filed shortly afterward. It may still have been untimely (a question on which we usually defer to the district judge, *United States v. City of Chicago*, 897 F.2d 243 (7th Cir. 1990)), but I find Judge Fairchild's analysis of the point unconvincing because he focuses on the delay from the inception of the suit, and that is the wrong focus. *United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989). See also *United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983).

The proposition that the attorney general is an adequate representative of the fetuses that will be aborted if the consent decree is approved fictionalizes the notion of "adequacy" of representation, and I am not a fan of legal fictions. The consent decree guts a statute that was (to speak realistically) designed to limit the number of abortions performed in Illinois by making abortion more expensive. The statute imposed onerous requirements, in the name of health, on abortion providers. In invalidating it this court found the health rationale less than persuasive, so that the statute stood exposed as an attempted end run around *Roe v. Wade*. *Ragsdale v. Turnock*, 841 F.2d 1358, 1371-75 (7th Cir. 1988). The statute's basic requirements are that abortions may not be performed in doctors'

offices and that abortion clinics have to be so well equipped to deal with possible medical emergencies as to be the equivalent of small hospitals. The joint effect of these requirements, had they not been enjoined from the outset, would have been to increase the cost of abortion in Illinois substantially, because few public hospitals are willing to perform abortions.

The consent decree preserves very little of the statute. *Ragsdale v. Turnock*, 734 F. Supp. 1457 (N.D. Ill. 1990). The "small hospital" requirements are confined essentially to facilities that perform abortions after the eighteenth week of pregnancy. So first-trimester abortions—the vast majority (more than 90 percent nationwide, though I don't have figures for Illinois)—are unaffected by the statute. And the decree abandons the statute's ban on abortions performed in a physician's office.

The Attorney General of Illinois thus knuckled under to this court's divided panel decision even though the Supreme Court had scheduled the case for oral argument of his appeal, and by doing so he doomed the first-trimester fetuses who would have been saved if the statute had been saved. He traded these fetal interests for other goods, such as an end to a costly lawsuit that he feared losing, or more likely (for he might well have won the case in the Supreme Court) for political advantage. But traded them he has. Perhaps the beneficiaries of the trade include a few second- or third-trimester fetuses, but almost all abortions are performed by the eighteenth week of pregnancy.

I know the government is presumed to be an adequate representative of a proposed intervenor when it is "charged by law with representing [the proposed intervenor's] interests." *American National Bank & Trust Co. v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1989); *United States v. South Bend Community School Corp.*, 692 F.2d 623, 627 (7th Cir. 1982); see *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 984-90 (2d Cir. 1984) (Friendly, J.). And since the case law treats the state as

the guardian of the interests of fetuses carried in the wombs of women in the state, *Roe v. Wade*, 410 U.S. 113, 150 (1973), it is an easy step to the conclusion that the state is a presumptively adequate representative of those interests. The step was taken in *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985), and *Roe v. Casey*, 623 F.2d 829, 832 n. 7 (3d Cir. 1980). But a real presumption is rebuttable ("conclusive presumption" is an oxymoron), and if this one is not, why did the court in *Keith* bother to point out that the attorney general was defending the abortion statute at issue in that case adequately? 764 F.2d at 1270. In negotiating the consent decree in the present case, the attorney general pretty much abandoned the fetuses to the abortionist's knife.

To speak in this dramatic fashion is of course to treat fetuses as people—as holders of interests—rather than as inanimate objects; and the status of fetuses is controversial, to say the least. But for many purposes the law *does* treat them as people. In Illinois, if you shoot a pregnant woman in the abdomen and kill the fetus, you are guilty of the crime of intentional homicide of an unborn child, and the penalty is almost as severe as for first-degree murder: the only difference is that the death penalty may not be imposed. Ill. Rev. Stat. ch. 38, ¶ 9-1.2. This is true regardless of the age of the fetus. Illinois has also extended its tort statute for wrongful death of a human being so that it covers fetuses from the moment of conception. Ill. Rev. Stat. ch. 70, ¶ 2.2. No one suggests that in extending to first-trimester fetuses legal protections originally designed for children, the state is violating *Roe v. Wade*, so long as it doesn't try to use these legal protections to interfere with abortions privileged by that decision—in other words, so long as it protects fetuses against third persons but not against mothers upon whom *Roe v. Wade* confers a constitutional right of abortion, or against their agent, the abortionist. It follows, I should think, that fetuses are (in Illinois anyway) persons for purposes of a decision on what weight to give their interests in applications for intervention made under Rule 24(a)(2).

That rule doesn't create or define interests; it takes those interests as it finds them in state law or other sources of legally protected rights. A fetus's father is not entitled under existing law to prevent the mother from having an abortion, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 70-71 (1976), but who is better fitted to represent the fetus if the state's attorney general abandons the protective responsibility that law places on him? "Abandonment" of fetal interests is a fair description of the attorney general's action in negotiating this consent decree.

Judges have a natural inclination to fictionalize "adequacy" of representation in order to prevent the courts from being swamped by multiparty litigation. (In this case intervention would lead to the nullification of the consent negotiations and the restoration of the case to the Supreme Court's docket, since a case can't be settled without the consent of all the named parties and these would-be intervenors are not prone to compromise.) If a state in defending an environmental statute gave less weight to preserving forests than to preserving wetlands, it would not follow that arborealists should be permitted to intervene to present evidence on behalf of their beloved trees. This is the sense of such decisions as *United States v. Hooker Chemicals & Plastics Co.*, *supra*, and of our own *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985). More than docket pressures are at work in these cases. Environmental litigation involves tradeoffs among human health, aesthetic and ecological concerns, and commercial values, and the government agencies charged with administering these statutes should not be presumed to be incompetent to balance the competing considerations in a reasonable way. This case, too, could be thought to involve tradeoffs between "statistical lives" (i.e., low probabilities of illness or death) and other valuable goods, inasmuch as the abortion statute does not forbid abortions but merely makes them more costly. That is one way to look at the case but another is that a government official has decided to allow a class of what

for purposes of this suit we must treat as human beings to die because the official lacks the stomach, political or otherwise, to litigate the case in the Supreme Court. In such a case the presumption that he is representing the class adequately might be thought rebutted.

I need not pursue the question. Intervention was properly denied, regardless of adequacy of representation, simply because to be allowed to intervene as a party you must have standing to litigate and these movants do not. It is true that *Diamond v. Charles* is noncommittal on the question whether an intervenor must have standing. 476 U.S. at 69; see also *id.* at 73-74 (concurring opinion); *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989) (reviewing split in the courts of appeals). But this court has held that he must. *Keith v. Daley*, *supra*, 764 F.2d at 1268. He wants to be a party, in major part so that he can litigate if the other parties with whom he is aligned fall out of the case, which is just what has happened here. The state has dropped the torch; the fathers of potentially affected fetuses want to pick it up. They must therefore demonstrate that they have standing to litigate this case as plaintiffs and appellants.

They do have standing in the barebones Article III sense. As fathers of unborn children (as the State of Illinois chooses to regard fetuses from the moment of conception), they are harmed, albeit in merely a probabilistic sense—but that is enough for standing, *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991), and cases cited there—by a consent decree that by reducing the cost of abortions makes it more likely (though not highly likely) that their unborn children will be aborted. They are also the natural representatives of a group of inarticulate and helpless persons whose lives are at stake, and the extinction of those lives is the sort of tangible injury that is the stuff of actual cases in the Article III sense.

But there are other criteria of standing besides whether the plaintiff or persons represented by him have suffered an actual injury, which is the Article III criterion. The

pertinent one here is whether the person seeking party status is someone upon whom the statute confers a right of enforcement. *North Shore Gas Co. v. EPA*, *supra*, 930 F.2d at 1243. The movants want to intervene in order that the abortion statute may be enforced in its pristine form, uncontaminated by the attorney general's compromises. But it is a regulatory statute, and in general and also in regard to this particular statute private persons have no right (in our legal system, unlike for example the British) to enforce criminal or other regulatory statutes, unless of course the statutes also create private rights of action, which this one does not. Private persons can complain to the enforcement authorities and badger them to bring enforcement actions but they cannot force them to do so or stand in their place and bring the actions themselves. Some regulatory statutes, it is true, are interpreted to create implied private rights of action, but no one argues that the Illinois abortion statute should be so interpreted. And while I can imagine an argument that a woman who suffers a medical injury as a result of the failure of an abortion clinic to comply with the statute should be able to use the violation to establish medical malpractice, the argument is not made and anyway is not available to these intervenors; they are not within the hypothetically protected class. (The female appellants are, and their party status—as members of the plaintiff class—is unquestioned. But they have as I said earlier no standing to appeal a settlement on the ground that it gives them more than they want or are entitled to. Nor have they asked that they be realigned as parties defendant—in which event their lack of standing would rest on the same ground as the fathers'.) The would-be intervenors are persons distressed by the attorney general's refusal to enforce a regulatory statute to the hilt. Such persons have no standing to sue, and therefore they have no standing to intervene in this suit to prevent adoption of a consent decree that will disable the attorney general from enforcing the statute effectively.

Any doubt is dispelled by the Supreme Court's decision in *Diamond v. Charles*, *supra*. Diamond was a physician who supported another Illinois abortion statute held unconstitutional by this court. He had been permitted (rightly or wrongly we need not decide today) to intervene in the lower-court proceedings in order to defend the statute, and he tried to appeal the case to the Supreme Court, the state attorney general having acquiesced in our decision and refused to appeal. The Supreme Court held that *Diamond* lacked standing to maintain the appeal. A private citizen lacks a legally protected interest in the prosecution of another person. 476 U.S. at 64-65. See also *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Board of Trade v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989). Hence no individual may "assert any constitutional rights of the unborn fetus. Only the State may invoke regulatory measures to protect that interest, and only the State may invoke the power of the courts when those regulatory measures are subject to challenge." *Diamond v. Charles*, *supra*, 476 U.S. at 67.

Any other conclusion would interfere with the separation of powers within state government, and that separation is not a proper matter of federal judicial concern. *Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir. 1991). Illinois has given its attorney general the exclusive responsibility to enforce the abortion statute. It has not parceled out that responsibility between him and a host of self-appointed private attorneys general. It is *his* decision to make whether and how vigorously to enforce the abortion statute, cf. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and part of this decisional responsibility is deciding how vigorously to defend the statute in suits challenging its constitutionality. "The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made." *Diamond v. Charles*, *supra*, 476 U.S. at 65. We may not use Rule 24(a)(2) to

subvert the state's separation of powers by preventing the Attorney General of Illinois from exercising the responsibilities that the state has assigned to him, and to him alone.

Concern has been expressed that state or federal officials might use federal consent decrees to tie the hands of their successors or to disrupt the allocation of power between branches of state government. Frank H. Easterbrook, "Justice and Contract in Consent Decrees," 1987 *U. Chi. Legal Forum* 19; Michael W. McConnell, "Why Hold Elections? Using Consent Decrees to Insulate Policies From Political Change," *id.* at 295. A lame-duck state attorney general might agree to embody in a federal consent decree restrictions on the operation of the attorney general's office that might cripple his successor, or (as charged in this case) that might gut an arguably constitutional statute that had been duly enacted by the state legislature. By asserting that no one has standing to appeal the consent decree in this case, I may seem to be placing such gambits beyond possibility of appellate correction. That would be paradoxical, since one of my grounds for denying that any of the appellants has standing was that permitting the appeal would interfere with the internal state allocation of governmental powers. Concern with such interference has been held a proper ground for declining to approve a consent decree. *Kasper v. Board of Election Commissioners*, 814 F.2d 332 (7th Cir. 1987).

The paradox is dispelled by reflection that if Attorney General Hartigan's successor should seek to enforce the statute in defiance of the consent decree and be met with a charge that he is violating the decree, he will be able to challenge its lawfulness on appeal, since the fact that the decree could not have been appealed by the usual route would make that a proper form of collateral attack. Cf. *Martin v. Wilks*, 490 U.S. 755, 768 (1989). Or should the state legislature condition appropriations for the attorney general's office on his enforcing the statute notwithstanding the decree and the condition be challenged

as a violation of the decree, the legislature can by this route, and for the same reason, obtain appellate review. (And in federal court, notwithstanding the intragovernmental character of such a suit. Cf. *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Risser v. Thompson*, *supra*, 930 F.2d at 550-51.) The appellants before us cannot obtain appellate review only because the decree has not done *them* the type of harm that the law requires as a predicate for mounting a legal challenge, whether in a trial or in an appellate court. They are the wrong appellants.

FLAUM, *Circuit Judge*, concurring in part and dissenting in part. Judge Fairchild and Judge Posner each identify reasons to bar the class members and proposed intervenors from challenging the settlement in this case. Because I believe that certain of the individuals before us can appropriately challenge that settlement, and because I question the process by which that settlement was arrived at, I find myself unable to join either of my colleagues' opinions.

I.

On the question of whether Messrs. Reed and Augenbaugh should have been permitted to intervene under Fed. R. Civ. Pro. 24, I agree with Judge Posner's view that the proper focus on the timing of their intervention looks to the date upon which the proposed settlement was first revealed to the world. *See ante* at 12-13. Until that date, as Judge Posner notes, these proposed intervenors had little incentive to seek to join this suit, because they believed they could rely on the Illinois Attorney General to defend the statutes challenged by the plaintiffs in this case. I also agree with Judge Posner that Mr. Reed and Mr. Augenbaugh lack standing to assert their claims before this court because they fall outside the range of interests the various Illinois statutes at issue in this case are intended to protect.

I differ with both my colleagues, however, on the question of whether Mrs. Greenwood and Mrs. Murphy, who like all other Illinois women of childbearing years are members of the plaintiff class, lack standing to challenge the consent decree. My difference with my brothers is one of characterization: they see the two class members as objecting to the settlement arrived at on the ground that it was too favorable to them. I view them as challenging both the result of the settlement *and* the process by which that result was reached, a process which, as discussed more fully below, left much to be desired.

Rule 23(e) requires district courts to approve a settlement in a class action before the settlement may bind absent class members. *See* 2 H. Newberg, Class Actions § 11.23 (2d ed. 1985). Particularly in public-law litigation, where consent decrees and settlements often approach the specificity of regulatory codes, various class members may find any number of reasons to challenge the final decree or agreement. Because of the broad range of interests class members may have in the nature and scope of relief a settlement or consent decree provides, I fear that Judge Posner may over-simplify the standing question when he writes that "a member of a class does not have standing to challenge a settlement that favors him in a tangible sense, though it offends him in an ideological sense." *Ante* at 12. Perhaps the objecting class members in this case would not be satisfied with any settlement that continues to permit legal abortion in Illinois, but their appeal, at least in part, focused more narrowly on the question of whether the settlement they contest was arrived at through arms-length negotiations and was approved after a careful examination by the district court.

It may well be that plaintiffs who seek to challenge the settlement reached in a class action solely on ideological grounds have no standing. I take the view, however, that any member of a plaintiff class may appeal the settlement of a class action on the ground that the district court's inquiry into the fairness of the settlement was inadequate and that the settlement was therefore impaired. Any

other position, it seems to me, mocks the words this court and others have used in advising trial judges of their duty to ensure that consent decrees are "not illegal, a product of collusion, or contrary to the public interest." *South v. Rowe*, 759 F.2d 610, 613 n.3 (7th Cir. 1985).

Our instruction to district courts to ensure that class action settlements and consent decrees are not the product of collusion recognizes that the settlement in a class action, typically arrived at through the active involvement of a small fraction of the class members, may not match the expectations of the plaintiff class as a whole. Our scrutiny of these decrees is thus intended to protect "those who did *not* participate in negotiating the compromise." *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). We remind district courts to scrutinize the legality of settlements and consent decrees and their effect on the public interest because we recognize that, especially in public-law litigation, these effects may reach far beyond even the nominal parties to the suit, let alone those who participated in resolving it. Ironically, however, under Judge Posner's approach it is only those who are satisfied with the settlement who would be able to challenge the fairness of the process that led to its adoption. Those who are dissatisfied with the process, for any reason except that they received "too little," are barred from challenging the fairness of that process on appeal. In practice, of course, those who were involved in the negotiation of a settlement or consent decree will rarely challenge the fairness of a process in which they actively participated. That task will be left to those who for one reason or another are dissatisfied with that process, and perhaps with the outcome it led to as well.

The remedy Judge Posner holds out for today's objectors is the possibility of subsequent suits challenging the settlement or consent decree, instituted by parties who later become aggrieved by its terms. In my view, however, we only prolong the injury caused by a consent decree arrived at through an unfair process by failing to invalidate it sooner rather than later. If the decree in this

case is, as the objectors allege, the product of inadequate or incomplete representation, the agreement will not increase in legitimacy through the passage of time. Equally important, in approving this decree the district court assumed a continuing duty to monitor the parties' compliance with its terms. In fulfilling this responsibility, the federal courts will be called upon to enforce the result of an arguably flawed process, at least until the day when Judge Posner's hypothetical future challenger materializes. Finally, even those who benefit most from a given consent decree are harmed when courts close their doors to dissatisfied non-participants until some future time, because until the grievances of these non-participants are addressed, the decree remains suspect. Certainly the named plaintiffs and defendants in this case would be happier with a ringing affirmance of the district court's approval of the decree than with Judge Posner's nod to future Illinois attorneys general and legislators.

Unlike Judge Posner, I am unwilling to await some future litigant. I would instead preserve the right of appeal for class members who, for one reason or another, believe that the process that led to the adoption of the settlement or decree—which will preclude them from asserting their legal rights in the future, *see Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921)—was tainted. In some cases they may be right, and an appellate court will be able to prevent an unfair or unlawful settlement or consent decree from taking effect. In all cases we will satisfy the objecting class members that they have received justice rather than leaving them to walk down the courthouse steps feeling twice spurned by the judicial system, first by a settlement reached and approved through inadequate procedures, and second by a rule of standing that denies them the right to challenge that settlement. So long as challenges to the procedure leading to a settlement are brought by class members, appeals courts should remain open to hear them.

Because I conclude that two of the four individuals objecting to the fairness of the consent decree arrived at in this case have standing to do so, I turn to the substan-

tive issue presented in this appeal: whether the decree in this case is "fair, reasonable and equitable, and does not violate the law or public policy." *Sierra Club v. Elec. Controls Design*, 909 F.2d 1350, 1355 (9th Cir. 1990). In my view, the district court's examination of the troublesome issues raised by the decree renders us incapable, on this record at least, of answering this question. The district court in this case yielded to the view that consent decrees are essentially contracts between the litigants, with the district court's role limited to "sign[ing] on the line provided by the parties." *United States v. Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (*en banc*) (opinion of Rubin, J.). It chose not to examine, in any but the most preliminary fashion, the lawfulness of the decree under the federal constitution or its fidelity to Illinois law and public policy. And it did so despite the unique circumstances that gave rise to the settlement of this suit, circumstances which made a deeper inquiry particularly appropriate.

II.

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court ruled that "the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. The Court held that, at least in the first trimester, this liberty interest was sufficient to require that if the pregnant woman decided to terminate her pregnancy, "the judgment may be effectuated by an abortion free of interference by the state." *Id.* at 163. *See also Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429-430 (1983). This preference for the woman's liberty interest over the government's interest in regulating abortion was the law when the district court granted a preliminary injunction to the plaintiffs in this case. *See Ragsdale v. Turnock*, 625 F. Supp. 1212, 1229-30 (N.D. Ill. 1985) ("[A]ny regulation, even a general regulation, which burdens a woman's right to choose to terminate her pregnancy during the first trimester would have to meet the compelling

governmental interest requirement."). It remained the law when this Court affirmed that decision. *See Ragsdale v. Turnock*, 841 F.2d 1358, 1368 (7th Cir. 1988) ("[W]here first trimester abortions are involved, not only must the impact of the challenged regulation be insignificant in terms of the woman's exercise of her right, but also [ ] the regulation must be justified by important state health objectives."). But it may well have ceased to be the law on July 3, 1989, when the Supreme Court announced its decision in *Webster v. Reproductive Health Servs.*, 492 U.S. 490.

Writing for three members of the Court in *Webster*, Chief Justice Rehnquist dispensed with the limits *Roe* placed on first-trimester abortions, observing that he could not see "why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." 492 U.S. at 519. For his part, Justice Scalia explicitly called for *Roe* to be overruled. *Id.*, 492 U.S. at 532, 537 (Scalia, J., concurring in part and concurring in the judgment). And Justice O'Connor, while foreswearing any desire "to reexamine *Roe*," 492 U.S. at 526 (O'Connor, J., concurring in part and concurring in the judgment), nevertheless voted to uphold a Missouri statute that limited the discretion of physicians in performing abortions in the second trimester for reasons entirely unrelated to the welfare of the mother. As Justice Blackmun pointed out in dissent, this statute would have been unconstitutional under *Roe*'s trimester framework because *Roe* does not permit regulation "in the interest of potential life . . . until the third trimester." *Webster*, 492 U.S. at 541 (Blackmun, J., concurring in part and dissenting in part). *See also Roe*, 410 U.S. at 164 (limiting second-trimester regulation to measures "reasonably related to maternal health."); *Akron*, 462 U.S. at 416.

Webster is a plurality opinion, and admittedly does not announce *Roe*'s demise. The fact remains, however, that

in *Webster* five members of the Court agreed that the balance *Roe* struck between a woman's interest in terminating her unwanted pregnancy and the state's interest in ensuring the safety of the abortion procedure and protecting fetal life no longer reflected its interpretation of the Fourteenth Amendment's due process clause. Neither the litigants in this case nor the district court needed to resort to tea leaves to divine that *Webster* had altered the constitutional landscape upon which this case would be contested if it were allowed to continue in the Supreme Court. Indeed, the Illinois Public Health Director and his codefendants relied on *Webster* in their brief to the Supreme Court in this case, arguing that, like the Missouri restrictions on abortions in state hospitals upheld in *Webster*, the sanitary regulations imposed on clinics by the Illinois statutes at issue in this case "do not unduly burden the abortion decision." Brief for Appellant at *29, *Turnock v. Ragsdale*, No. 88-790, August 31, 1989 (available on LEXIS, GENFED library, BRIEFS file).

Nevertheless, when those who objected to the proposed consent decree sought to rely on *Webster* in contesting the lawfulness of the decree, the district court rejected this argument, summarily labelling it "unavailing" because the precise regulatory measures at issue in *Webster* were different in kind from the Illinois statutes challenged in this case. *Ragsdale v. Turnock*, 734 F. Supp. 1457, 1460 (N.D. Ill. 1990). Like the district court, Judge Fairchild takes only passing note of *Webster*'s impact on this case, writing in a footnote that he "see[s] nothing" in *Webster* or more recent abortion decisions that "affect[s] the statutes challenged in this case." *Ante* at 8, n.1. Judge Posner's opinion recognizes that the state "might well have won the case in the Supreme Court," *ante* at 14, tacitly recognizing that the jurisprudence of abortion had, at a minimum, shifted to permit greater state regulation when *Webster* was handed down.

I am unable to agree that the question of *Webster*'s impact on the legal issues in this case could be resolved in the manner adopted by the district court. Though Justice

Scalia was moved to write in *Webster* that the limited scope of the decision would require "the mansion of constitutionalized abortion law . . . [to] be disassembled doorjamb by doorjamb," 492 U.S. at 537, it is nonetheless true that ever since July 3, 1989, the integrity of that structure has been open to question. The district court's terse rejection of the argument that *Webster* might be relevant in examining the lawfulness of the proposed consent decree was, in my view, an insufficient response to the questions that decision raises about the lawfulness and consistency with Illinois public policy of the consent decree in this case.

III.

Of course, *Webster* leaves states like Illinois free to regulate or not regulate abortion, and even, perhaps, to enact statutes embodying precisely the provisions contained in the consent decree the district court approved. Moreover, the fact that the consent decree permits less state regulation of abortion than might be constitutional in the wake of *Webster* is itself not a reason to reject the decree: a consent decree may provide relief beyond that allowed by the statute under which the plaintiff brought suit. *See Firefighters Local 93 v. Cleveland*, 478 U.S. 501, 522-23 (1986) (consent decree resolving employment discrimination case can provide relief that goes beyond "the limitations Congress placed . . . on the power of the federal courts to impose obligations on employers or unions to remedy violations of Title VII . . . ."); *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 338 (7th Cir. 1987). In this case, however, approving a consent decree that limits the state's power to regulate abortions more than is required by *Webster* carries with it the risk of enjoining the enforcement of valid Illinois statutes and regulations. Because over-enforcing the due process clause in this case may have led the district court effectively to repeal constitutional state statutes, it had a responsibility, growing out of the duty of federal courts to preserve the allocation of powers between the states and the federal government, to inquire into the possible lawfulness of the challenged state enactments.

In entering a consent decree, a district court employs a remedy of the flexibility that has typically characterized equitable relief. *See* S. Symons, 1 Pomeroy's Equity Jurisprudence (5th ed. 1941), § 109 at 141; *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1984) (consent decree "virtually by definition will contain equitable provisions"). While federal courts have broad equitable powers, these powers are not unlimited. One restriction on their scope is the concept "that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935). More recently, the Court restated this proposition in *Rizzo v. Goode*, 423 U.S. 362 (1976), writing there that "[w]here . . . the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' " 423 U.S. at 378 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)).

Courts differ on the question of whether the consent of the state to a proposed settlement or decree relieves a district court of its responsibility to inquire into the federalism concerns the decree raises. *Compare, e.g., Allen v. Alabama State Bd. of Educ.*, 816 F.2d 575, 577 (11th Cir. 1987) *with Kasper*, 814 F.2d at 340-41. *See generally, Note, Federalism and Federal Consent Decrees Against State Governmental Entities* (hereinafter, "Federal Consent Decrees"), 88 Colum. L. Rev. 1796, 1801 & nn. 31-32 (1988) (collecting cases). I believe the better view is the one we took in *Kasper*: regardless of the state's consent, "[a] federal court must preserve the appropriate relation between state and national power." 814 F.2d at 340. *See also Lelsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir. 1987) (vacating consent decree that created "federal court remedy unfounded in federal law [which] intrudes into the governance of matters otherwise presided over by the

state.").[1]

When we enjoin the enforcement of a state statute on federal constitutional grounds, the views of democratically elected state legislators are supplanted by those of unelected federal judges. This outcome is warranted when the challenged state statute violates rights guaranteed by the federal constitution or encroaches upon some other aspect of federal law. To my mind, however, "the appropriate relation between state and national power" we instructed district courts to be mindful of in *Kasper* is one in which federal judges employ their equitable powers to enjoin the enforcement of state statutes *only after* they have determined that these statutes contain some constitutional deficiency. *See General Bldg. Contractors v. Pennsylvania*, 458 U.S. 375, 399 (1982) (federal remedial powers "could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and extent of the violation."); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971) ("In seeking to define . . . how far" equitable power to order school desegregation extends, "it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation."); *Jenkins by Agyei v. Missouri*, 807 F.2d 657, 666 (8th Cir. 1986) (*en banc*) ("Federal courts may not invoke their equitable power to fashion a remedy to correct a condition unless it currently offends

[1] Indeed, *Rizzo v. Goode*, 423 U.S. 362 (1976), may well compel the view that the state's consent to a decree does not eliminate the limits federalism imposes on the district court's power to enter the decree. Though *Rizzo* involved an injunction rather than a consent decree, the remedy adopted by the district court "resembled a consent decree in several respects." Federal Consent Decrees at 1804 n.48. The defendants in *COPPAR v. Tate*, the district court action reviewed in *Rizzo*, played a significant role in drafting portions of the injunction, *see* 60 F.R.D. 615, 616 (E.D. Pa. 1973), and as Justice Blackmun observed in his *Rizzo* dissent, "[t]he remedy was one evolved with the defendant officials' consent, and it was one that the police department concededly could live with." 423 U.S. at 381 (Blackmun, J., dissenting).

the constitution."). These cases compel the conclusion that, when a proposed consent decree would enjoin the enforcement of state statutes, a district court evaluating the decree must satisfy itself that these statutes suffer from some infirmity that would allow the court to enjoin them absent the state's agreement.

In this case, due regard for the legislative judgment of the people of Illinois required the district court to evaluate, in light of *Webster*, the constitutionality of the various state statutes governing health facilities and medical practice whose enforcement the decree will bar. The Supreme Court's holding in *Firefighters* that consent decrees can provide relief beyond what the plaintiffs could have obtained at trial does not obviate the need for this inquiry. Unlike the situation in that case (a Title VII suit against a municipal employer) if the consent decree in this case provides relief beyond that required by the Fourteenth Amendment, it will permanently enjoin the enforcement of state statutes that in no way conflict with any provision of federal law, constitutional or statutory.

The statutes enjoined in this decree represent the decisions of the people of Illinois, speaking through their elected representatives. The plaintiffs contend that the legislature's unspoken aim in enacting these provisions was to limit the availability of low-cost clinic abortions. If so, these statutes are consistent with other statements of the popular will in Illinois, most notably the Human Life Act, Ill. Ann. Stat. ch. 38, ¶ 81-21 (Smith-Hurd Supp. 1991), which declares "the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life," as well as the various statutes Judge Posner relies upon in concluding, *see ante* at 15, that Illinois regards fetuses as persons. Before approving a decree that upsets these legislative choices, the district court had a duty to explore whether the challenged enactments offend the constitution. So far as the district court's opinion reveals, this inquiry never occurred.

IV.

The district court apparently decided that a deeper inquiry into the lawfulness of the challenged Illinois statutes was unnecessary in part because the consent decree it was called upon to approve was the product of bargaining from which neither side emerged wholly victorious. *See Ragsdale*, 734 F. Supp. at 1460. The settlement reached by the parties, the district court wrote, had allowed " '[e]ach side [to] gain[ ] the benefit of immediate resolution of the litigation and some measure of vindication for its position while foregoing the opportunity to achieve an unmitigated victory.' " *Id.* (quoting *EEOC v. Hiram Walker & Sons*, 768 F.2d 884, 889 (7th Cir. 1985)). I agree as a general matter that one factor that might justifiably lead a district court to limit its scrutiny of a proposed consent decree is the fact that "the [ ] decree embodies as much of [the parties'] opposing purposes as the respective parties have the bargaining power and skill to achieve." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). Indeed, adversity between the parties to the negotiations that lead to the proposed decree will tend to ameliorate the federalism concerns discussed above, because when the state believes it will win on the question of the constitutionality of a state statute should the case go to trial, it has little incentive to enter into a consent decree enjoining the statute's enforcement.

This assumes, however, that the persons negotiating for the state set as their goal the enforcement of the will of the state's legislators, and by extension, the people who put them in office. Students of the use of consent decrees in public-interest litigation have noted, however, that the assumption that state defendants entering into a decree represent *all* the state's interests in the litigation is frequently mistaken. Rather, it is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches. *See, e.g.*, Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983

Duke L.J. 1265, 1292, 1294-95 (1983) (discussing phenomenon of "[n]ominal defendants [who] are sometimes happy to be sued and happier still to lose."); *see also* Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. L. Forum 19, 30-37 (1987); McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies From Political Change*, 1987 U. Chi. L. Forum 295, 301 (noting that "one of the evils to be guarded against is the collusive settlement—government lawyers settling a suit on favorable terms to the opposing party precisely because they expect that successive administrations may be less sympathetic to its cause."); Federal Consent Decrees at 1805-06. Courts, too, have been alert to the possibility that state defendants in public-interest litigation may have interests that depart from those of the government they serve. *See Rhodes v. Chapman*, 452 U.S. 337, 360 (1981) (Brennan, J., concurring) (noting that "[e]ven prison officials have acknowledged that judicial intervention has helped them to obtain support for needed reform."); *Kasper*, 814 F.2d at 340 ("district judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature . . . ."); *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986) ("A court must be alert to the possibility that a consent decree is a ploy in some other struggle.").

When confronted with allegations that a government agent with control over the decision to negotiate and enter into a consent decree may have interests that differ from those of other segments of the government, a district judge's scrutiny of the decree must necessarily increase. One can accept Judge Posner's statement that "the separation of powers within state government" is not "a proper matter of federal judicial concern," *ante* at 19, but still conclude that the choice of which private agreements merit the approval—and continuing enforcement power—of a federal court is a matter of federal judicial concern. *See Kasper*, 814 F.2d at 340-341. One circumstance that might give a federal district court pause as it decides whether to approve the parties' proposed decree is a charge that

the officer who negotiated the decree on the state's behalf had "shattered" any expectation that he or she would vigorously defend state statutes. *See ante* at 13 (Posner, J., concurring). This is nothing more than a specific example of the heightened scrutiny this Court employs in passing upon settlements in which it appears that the interests of the litigants are in danger of being sacrificed for the benefit of their lawyers. *See, e.g., Armstrong v. Board of School Directors*, 616 F.2d 305, 313 (7th Cir. 1980) (discussing risk that "class counsel may be persuaded by the prospect of a substantial fee to accept a settlement proposal which leaves the class with less relief than could have been procured through more vigorous negotiation."); *Hiram Walker & Sons*, 768 F.2d at 890-91 (heightened scrutiny of consent decree appropriate where there is an allegation that "the attorneys involved have sacrificed their clients' interests to assure themselves of receiving sizable attorneys' fees.").

The alleged conflict of interest in this case was of a different sort. According to those who objected to the settlement, the Illinois Attorney General, who on behalf of the defendants directed the course of this litigation and the negotiations that led to the proposed decree, had "failed to defend the statutes and regulations which constitute the body of Illinois law" by agreeing to a decree more favorable to the plaintiffs than they would have received had the case proceeded in the Supreme Court. Fairness Hearing Transcript at 48. *See also id.* at 57, 83. These allegations were accompanied by news accounts in which both critics and supporters of the settlement speculated that the Attorney General had been eager to resolve this dispute because it had become politically disadvantageous to allow the high court to decide it. *See, e.g.*, Karwath & Brotman, *Illinois Abortion Case Settled*, Chicago Tribune, Nov. 23, 1989 at 1.

Knowing of these allegations, the district court had a "fiduciary duty" to the litigants, *Stewart v. General Motors*, 756 F.2d 1285, 1293 (7th Cir. 1985), to examine carefully the proposed consent decree to insure that the

state had not paid too high a price for a settlement which, as Judge Posner writes, "preserves very little" of the challenged statutes. *Ante* at 14. *Webster* made the need for this inquiry particularly acute: by improving the state's chances in the Supreme Court, it heightened concerns as to what prompted its chief legal officer to forego an opportunity to have the legislature's decision to regulate abortion vindicated. According to the objectors, in the wake of *Webster* the state's choice to agree to a settlement on terms highly favorable to the plaintiffs began to look like the kind of agreement that arms-length bargaining would not have produced.

Despite this contention, nothing in the district court's opinion suggests that it examined the proposed decree to determine whether it reflected the product of bargaining between genuinely adverse parties, that it was, in other words, within the range of fair settlements. Rather, the district court relied on the purported adversity between the Attorney General and the named plaintiffs, despite allegations that their interests at the time they negotiated the decree were not materially opposed. In fairness to both the Attorney General and the objectors, a more comprehensive inquiry could have addressed these allegations.

V.

As we wrote in *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1984), "how deeply the [district] judge must inquire" into the fairness of a proposed consent decree, "what factors he must take into account, and what weight he should give the settling parties' desires will vary with the circumstances." *Id.* at 1177. In this case, the district court was faced with a changing body of law concerning permissible regulation of abortion and a state officer whose motivations in settling this case were questioned at the fairness hearing and elsewhere. These circumstances demanded a more searching examination of the fairness of the consent decree the parties arrived at than the district court provided. I respectfully dissent.

APPENDIX B

(Entered August 20, 1991)

IN THE UNITED STATES COURT OF APPPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

Nos. 90-1907, 90-1908, 90-2122 and 90-2123

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 85 C 6011 - John A. Nordberg, Judge

Final Judgment: Affirmed as to the District Court's denial of intervention and dismissed as to the proposed intervenors and appellants, Murphy and Greenwood, with costs.

Dated: August 20, 1991

APPENDIX C

(Entered March 22, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

MEMORANDUM OPINION AND ORDER

Before the court is the parties' joint motion under Rule 23(e) of the Federal Rules of Civil Procedure for approval of a proposed settlement and consent decree. For the reasons stated below, the court grants the motion and enters the consent decree.

BACKGROUND

Plaintiffs brought this action on June 28, 1985, seeking declaratory and injunctive relief from the enforcement of portions of three Illinois statutes, the Medical Practice Act, Ill. Rev. Stat. ch. 111, Sections 4433(1)(a)-(e)(later recodified as Sections 4400-22 (1) (a) - (e)), the Ambulatory Surgical

Treatment Center Act, Ill. Rev. Stat. ch. 111 1/2, Sections 157-8.1 et seq., and regulations promulgated thereunder, and the Health Facilities Planning Act, Ill. Rev. Stat. ch. 111 1/2, Sections 1152 et seq.

Plaintiffs challenged the constitutionality of these statutes and regulations, contending that they form a scheme which in effect requires all abortions to be performed in a hospital or its functional equivalent. Plaintiffs charged that this scheme violated the equal protection rights of Illinois physicians who perform or desire to perform abortions, and the privacy rights of Illinois women who desire or may desire to obtain an abortion. This court agreed, and on November 27, 1985, granted plaintiffs' motion for preliminary injunction.[1] On March 10, 1988, the United States Court of Appeals for the Seventh Circuit upheld the injunction, except for one portion which it vacated as moot.[2]

Defendants filed a Notice of Appeal, seeking review by the United States Supreme Court. On July 3, 1989, the Supreme Court entered an order accepting the case for oral argument but postponing the question of jurisdiction until the hearing on the merits. Before the date scheduled for oral argument, the parties negotiated the proposed consent decree now before this court. The decree seeks to resolve all claims for declaratory and injunctive relief brought by plaintiffs and reserves their claim for attorney's fees, costs and expenses. On December 1, 1989, the Supreme Court granted the parties' joint motion to defer proceedings there pending this court's decision to approve or disapprove the proposed decree.

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[1]The court's opinion is published at 625 F. Supp. 1212 (N.D. Ill. 1985).

[2]The decision of the Court of Appeals is published at 841 F.2d 1358 (7th Cir. 1988).

Following the Supreme Court's order, the parties gave notice of the proposed settlement to the plaintiff and defendant classes, with this court's approval.[3] The court allowed any class members objecting to the proposed settlement to file submissions by February 9, 1990, with responses due the following week. During this period, the court received 326 telephone calls, two telegrams, and 1,266 letters. The court read every single letter in its entirety.

On February 23, 1990, the court conducted a hearing to assess the fairness of the proposed settlement. The parties explained their reasons for negotiating the settlement; afterward, the court heard objections from amici who had filed briefs with the court.[4] Finally, the court permitted

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[3]The parties gave notice by mail to all facilities which, at the time the complaint was filed, were licensed ASTCs (Ambulatory Surgical Treatment Centers) and offered abortions; by publication in the Chicago Tribune and the Chicago Sun-Times to all presently licensed ASTCs which offer abortions; and by mail to all members of the defendant class of state's attorneys. All methods of notice were completed by January 29, 1990.

As required, the notice also informed class members of the fairness hearing to be conducted on February 23, 1990. For this and other aspects of the settlement process, the court was guided by the procedures set forth in the Manual for Complex Litigation, Second, Sections 30.4-30.47 (1985).

[4]Among the amici were certain members of the Illinois General Assembly and an individual attorney from Chicago. There were other objectors who filed materials with the court, but did not style themselves "amici." The court heard their comments as well. The court also heard objections from some of the state's attorneys of the defendant class, who had submitted briefs to the court.

Two objectors, Kenneth M. Reed and Mark I. Aughenbaugh, sought leave to intervene on behalf of "a class consisting of all Illinois unborn babies." Any interest in protecting the fetus is for the state to assert, however. The objectors brought no evidence showing "gross negligence or bad faith" committed by the state in representing the interests implicated by this litigation. Without such a showing, the state's

individuals attending the hearing — who filled the largest courtroom in the courthouse — to express their views if they wished. After reviewing the prior findings of fact and conclusions of law issued by this court, reviewing the opinion of the Seventh Circuit Court of Appeals and the applicable decisions of the United States Supreme Court, examining the briefs filed by the parties and objectors, and hearing and considering all of the written and oral presentations made in connection with the fairness hearing[5], the court makes the following findings of fact and conclusions of law.

DISCUSSION

In deciding whether to approve a proposed consent decree, "a district court must determine whether [it] is lawful, fair, reasonable, and adequate." E.E.O.C. v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985). The court does not draw on a clean slate, however. Deference must be given to the settlement, since it embodies a negotiated compromise between the parties. A district court should

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representation must be presumed adequate. United States v. South Bend Community School Corporation, 692 F.2d 623 (7th Cir. 1982). Accordingly, the court denied the objectors' petition but granted leave to file written objections and appear as amici, which they did. Their Petition to Reconsider Petition to Intervene and to Maintain Class Action of Baby Reed and Baby Aughenbaugh, filed March 15, 1990, is likewise denied. See United States v. City of Chicago, 897 F.2d 243 (7th Cir. 1990) ("intervention to take an appeal is permissible only if the original parties' decision to discontinue the battle reflects gross negligence or bad faith").

[5]One notable submission to the court is the Draft Order Approving and Entering Consent Decree, filed jointly by plaintiffs and defendants on March 16, 1990. It reflects the parties' stipulations as to findings of fact and conclusions of law in this case. As such it can more properly be characterized as a Stipulation, which is how the court will hereinafter refer to it. While declining to incorporate the entire Stipulation into this opinion, the court enters it into the record as evidence to be weighed in evaluating the proposed consent decree.

therefore "be chary of disapproving a consent decree." Id., p. 890. Indeed, the court "may not deny approval of a consent decree unless it is unfair, unreasonable, or inadequate." Id., p. 889.

The consent decree proposed here enjoins the enforcement of certain statutory provisions challenged by plaintiffs. Foremost among them are Section 157-8.3(A) of the ASTCA, defining any facility in which a medical or surgical procedure is utilized to terminate a pregnancy as an "Ambulatory Surgical Treatment Center"; and a host of regulations requiring ASTCs to comport with physical plant specifications and other restrictions which "in effect...require ASTCs to be the functional equivalent of small hospitals."[6] It was this statutory scheme that plaintiffs regarded as infringing on the constitutional right of women to have an abortion, a view shared by this court and the Court of Appeals.

The consent decree introduces a new scheme which identifies two types of surgical facilities: those that perform abortions beyond 18 weeks gestational age, or with general, epidural, or spinal anesthesia, or with incisions exposing the patient to a risk of infection; and those that perform abortions within 18 weeks gestational age, under local anesthesia. The former are made subject to a panoply of licensing provisions under the ASTCA and Health Facilities Planning Act. The latter, while still obliged to obtain a license, are

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[6]Ragsdale v. Turnock, 625 F. Supp. at 1216. Together with the appellate court's opinion, that decision contains exhaustive discussions of the statutes in question and plaintiffs' challenge to them. The court's task here is not to rehash that material, but rather to ask whether the proposed consent decree fairly addresses the concerns expressed on both sides of the dispute. Since the findings of fact set forth in the Ragsdale decisions are relevant to that inquiry, the court incorporates them in today's opinion.

required to comply with a new set of regulations tailored to those facilities.[7]

This scheme is neither unfair, unreasonable, or inadequate. As counsel for both parties noted during the fairness hearing, the settlement addresses each side's principal concern. To plaintiffs' satisfaction, the decree preserves their constitutional right to have or provide abortions; to defendants' satisfaction, it permits the Department of Public Health to regulate outpatient clinics devoted to abortions and abortion-related procedures. The decree reflects "the essence of settlement," which is "compromise...Each side gains the benefit of immediate resolution of the litigation and some measure of vindication for its position while foregoing the opportunity to achieve an unmitigated victory." Hiram Walker, 768 F.2d at 889.

Various objectors insist that the proposed consent decree compromises too much. Family Planning Associates Medical Group (FPA), a major provider of abortion services in Chicago and elsewhere, objects to the provision that subjects an abortion-only surgical facility to full ASTC regulatory requirements if it uses general anesthesia. "That provision," says FPA, "permits the imposition of burdensome and medically unnecessary regulations that would impermissibly infringe on the rights of the physician class to provide abortion services..." FPA brief, p. 2.

FPA's argument is unavailing. General anesthesia is more hazardous than local anesthesia, a fact to which Doctors Ragsdale and Hern, plaintiff and plaintiffs' expert,

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[7]The decree does not require a separate license for physicians whose offices are not primarily devoted to providing surgical services, and it does not affect the provision of abortions in hospitals.

respectively, testified. State Defendants' Response, p. 8. Indeed, the Abortion Standards and Guidelines of Planned Parenthood Federation of America, Inc. provide that "[g]eneral anesthesia may not be used in out-of-hospital settings." Id. In view of this distinction between local and general anesthesia, the court cannot conclude that the provision challenged by FPA renders the settlement unfair or unreasonable.

Equally unavailing are suggestions by a number of objectors that Webster v. Reproductive Health Services, Inc., __U.S.__, 109 S.Ct. 3040 (1989), requires disapproval of the settlement. Webster concerned the use of public facilities and employees to perform abortions, the use of public funding for abortion counseling, and viability testing at 20 weeks gestation. These issues are not involved here. As the state defendants properly observe, "[t]he Webster decision did not provide any definitive pronouncements for purposes of this litigation and did not overrule the previous relevant Supreme Court decisions." State Defendants' Response, p. 9.

Similarly, mere speculation that the Supreme Court might uphold the provisions challenged here in light of Webster will not invalidate the consent decree.[8] In deciding whether to approve a settlement, "[t]he district court should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." Hiram Walker, 768 F.2d at 889. Settlement proceedings are not an appropriate occasion for resolving the merits of undecided legal issues. The court declines the in-

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[8]To say the Supreme Court might uphold the challenged provisions is doubly speculative. Not only is the substantive law unsettled, but the Court reserved the issue of jurisdiction and may not have reached the merits in this case.

vitation of some objectors to do so.

Other objectors insist that the consent decree endangers the health and safety of women seeking abortions. There is no evidence to support this contention. To the contrary, in their briefs and at the fairness hearing, counsel for both parties made clear what their intentions were during settlement negotiations: to assure safe and sanitary conditions for abortion procedures while permitting women the opportunity to exercise their constitutional rights. Toward that end, the parties consulted with obstetricians, gynecologists, and other medical and public health experts in drafting the terms of the settlement.[9]

Far from leaving women unprotected, the settlement creates a network of statutes and rules regulating the provision of abortion services. Facilities that provide abortions beyond 18 weeks gestational age or use general anesthesia must comply with the Ambulatory Surgical Treatment Center Licensing Requirements. Facilities that offer abortion services within 18 weeks gestational age, using local anesthesia, must abide by the requirements set forth under subpart G of the ASTCA, "Limited Procedure Specialty Centers." Like any other provider of medical services, abortion providers must comply with standards of conduct generally applicable to the medical profession.[10] Finally, the Clinical

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[9]Among those consulted were the American College of Obstetricians and Gynecologists, Planned Parenthood Federation of America, the National Abortion Federation, and other professional societies. The parties also reviewed Williams Obstetrics and other respected medical texts and publications. Stipulation, p. 18.

[10]Some objectors complain that the decree puts physicians wholly outside the regulatory powers of the state, but that objection misses the mark. No less than the clinics regulated by the ASTCA, physicians may not violate accepted standards of medical practice when performing abor-

Laboratory Act — and any other present or future legislation not contrary to the consent decree — may be applied to providers of abortion services.[11]

Taken together, these statutes and regulations provide the state with ample authority to safeguard the health and safety of women seeking abortions. That is certainly the view of the Department of Public Health, which is charged with regulating health care in the State of Illinois: "it is the judgment of the medical doctors with the Department of Public Health that the remaining regulations provide a sufficient mechanism by which the Department can regulate and inspect these facilities in order to minimize the risk of harm to patients undergoing surgery at these facilities. This judgment, as well as the goal of regaining regulatory authority is consistent with the stated purpose of the ASTC Act to promote safe and adequate treatment.'" State Defendants' Response, p. 7 (citation omitted).

There remain two objections to the proposed consent decree worth discussing. A handful of state's attorneys contend that the defendant class to which they belong was not adequately represented during settlement negotiations. In support of this charge, the objectors refer obliquely to "information" culled from their review of the settlement proceedings which they regard as evidence of inadequate representation. They consider the behavior of their class

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tions.

Moreover, the decree leaves the Legislature free to amend the Medical Practice Act or to enact legislation specifically regulating physicians' offices.

[11]The consent decree does not, as some objectors contend, purport to bind future actions of the General Assembly. The decree specifically applies only to the challenged statutes as presently enacted. If those statutes are amended or new statutes passed, the decree does not affect their enforcement.

representative so suspect that, even if it does not require rejection of the proposed settlement, it warrants further discovery.

Their charge is without merit. On November 8, 1989, this court ordered the State's Attorney of Cook County, or his representative, to participate in settlement negotiations. Assistant State's Attorney Harold E. McKee, III, was assigned to the case. At the fairness hearing, plaintiffs and defendants alike attested to the vigor and frequency of Mr. McKee's participation in the negotiations. He "attend[ed] and participate[d] in all settlement negotiations...participated in drafting the proposed settlement and consent decree, represented the class interest in maintaining the ability to prosecute future violations under the settled acts, and also participated in the briefings held for the benefit of the news media..." State's Attorney Partee's Response, p. 4. The court finds his representation adequate and denies the Motion for Leave to Take Discovery brought by Dennis Schumacher, Greg McClintock, Samuel Naylor, and Stephen L. Reed, state's attorneys for Ogle, Warren, Hancock, and Henderson counties, respectively.

Finally, some objectors challenge the consent decree because it would expose defendants to a claim for attorney's fees. But the consent decree expressly reserves the issue of attorney's fees for resolution at a later date:

> The plaintiffs' entitlement to, and the amount of, any counsel fees and reimbursement of disbursements and expenses to be paid by the defendants shall be determined by the District Court upon proper application by the plaintiffs after the entry of the Consent Decree and final judgment.

Settlement Agreement, p. 5. Any objections regarding fees made at this time are premature.

The parties' Stipulation discusses this and nearly every other aspect of these settlement proceedings. Although far too detailed for full discussion here, some elements of the Stipulation deserve mention. Beginning with page 7, for instance, the Stipulation comprehensively reviews the procedural history behind the consent decree. The court incorporates that review in this opinion. Further, the Stipulation identifies several factors which may be used to decide whether a settlement is fair, including the strength of plaintiffs' case versus the settlement offer; the complexity and expense of further litigation; the reaction of class members to the settlement; the opinion of competent counsel; and the stage of proceedings and amount of discovery completed. Stipulation, p. 27.

Without launching into full analysis of these factors here, the court notes that it considered them all in reaching its holding today. The consent decree offers plaintiffs, by their own admission, "permanent injunctive relief similar...to that which they sought in this litigation..." (Stipulation, p. 28); further litigation could prove lengthy and expensive; few class members objected to the settlement; counsel were clearly well-informed and represented their clients zealously; and the settlement agreement arose late in the proceedings, after thorough discovery had been completed. These and other factors considered by the court are more fully explained by the parties in the Stipulation.

For the foregoing reasons, the court finds the proposed consent decree lawful, fair, reasonable, and adequate. Accordingly, the court grants the parties' joint motion for approval of the settlement, and enters the consent decree herewith.

ENTER: /s/ John A. Nordberg
United States District Judge

Dated: March 22, 1990

CONSENT DECREE

I. HISTORY OF THE LITIGATION

This class action litigation was commenced as a civil rights case on June 28, 1985, by named Plaintiffs Richard M. Ragsdale, M.D., Margaret Moe, R.N., the Northern Illinois Women's Center, Sarah Roe and Jane Doe, under 42 U.S.C. sections 1983 and 1988, and 28 U.S.C. sections 2201 et seq. Plaintiffs claimed that the challenged Illinois statutes and regulations, which included (1) the Medical Practice Act, ("MPA") Ill. Rev. Stat. ch. 111 section 4433 (a)-(e) (since recodified at Ill Rev. Stat. ch. 111 section 4400-22(1)), (2) the Ambulatory Surgical Treatment Center Act ("ASTC Act"), Ill. Rev. Stat. ch. 111 1/2 sections 157-8.1 to 157-8.16 and regulations promulgated thereunder, and (3) the Health Facilities Planning Act ("HFP Act"), Ill. Rev. Stat. ch. 111 1/2 sections 1151 to 1168, impermissibly restricted the performance of first and second trimester abortions and thus allegedly violated rights secured by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

A. Parties

1. Plaintiffs

Plaintiff Richard M. Ragsdale, M.D., is a physician, licensed to practice in Illinois, who is the Director of the Northern Illinois Women's Center. At the time the complaint was filed and at the present, Dr. Ragsdale performs abortions for his women patients who seek such medical

care. Plaintiff Margaret Moe is a registered nurse and the sole owner and executive director of a medical facility in Cook County, Illinois. Ms. Moe employs licensed physicians and she sought to offer abortion services at her facility. Plaintiffs Sarah Roe and Jane Doe are patients of Dr. Ragsdale who had sought and received an abortion from Dr. Ragsdale and who may need or desire another abortion in the future.

The named plaintiffs brought this lawsuit on their own behalf, on behalf of a class of physicians who perform or desire to perform abortions in the State of Illinois, and on behalf of a class of Illinois women who desire abortion services. In orders issued on November 27, 1985 and on December 11, 1985, this Court certified the following plaintiff classes pursuant to Rule 23(b) of the Federal Rules of Civil Procedure:

> (a) A plaintiff class consisting of all physicians and surgeons who perform or desire to perform abortions in the State of Illinois; [and]
>
> (b) A plaintiff class consisting of all Illinois women of child-bearing age who desire or may desire an abortion sometime in the future[.]

2. Defendants

Defendant Bernard J. Turnock, M.D., is the Director of the Department of Public Health of the State of Illinois and was sued in his official capacity. He is responsible for the enforcement of the ASTC Act and for the promulgation and enforcement of regulations under that Act, and has certain administrative responsibilities under the HFP Act.

Defendant Neil F Hartigan, Attorney General of the State of Illinois, was sued in his official capacity, in which he is charged with the defense of challenges to the MPA, the ASTC Act and the HFP Act, and their respective regulations, throughout the State of Illinois. In addition, as chief legal officer of the state, the Attorney General represents the directors of state agencies in their enforcement activities, and upon referral by these agencies, has certain enforcement responsibilities on behalf of these agencies.

Defendant Gary L. Clayton was sued in his official capacity as the Director of the Illinois Department of Registration and Education. As such Mr. Clayton, and his successor in office at the successor agency, Robert C. Thompson, the Acting Director of the Department of Professional Regulation, is empowered to implement, administer, and enforce the MPA.

Defendant Richard M. Daley was sued in his official capacity as State's Attorney of Cook County, and as the representative of the defendant class of all state's attorneys of the 102 counties of the State of Illinois. Under the ASTC Act, the Director of the Department of Public Health may, through the State's Attorney of the county in which the violation occurs, seek injunctions to restrain violations of the ASTC Act or its regulations, or enjoin future operation of any ambulatory surgical treatment center ("ASTC") violating the ASTC Act or its regulations. Under the HFP Act, state's attorneys may prosecute persons in violation of the Act for committing a business offense.

In orders issued on November 27, 1985 and on December 11, 1985, this Court certified the following defendant class pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure:

"A defendant class consisting of all State's Attorneys in the State of Illinois."

Richard M. Daley, as the State's Attorney of Cook County, was named as representative of this defendant class. Richard M. Daley has been succeeded in office by Cecil A. Partee, who pursuant to Rule 25(d), F.R.Civ.P., has been automatically substituted as the named defendant state's attorney and as representative of the defendant class of state's attorneys.

B. Jurisdiction

This Court concludes that it has jurisdiction of this action under 28 U.S.C. section 1343. Venue is proper in the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. section 1391.

C. The Claims

In their Complaint, plaintiffs alleged that the challenged statutes and regulations impermissibly restricted the ability of physicians to perform and the ability of women to secure first and second trimester abortions. Plaintiffs claimed that the laws singled out abortions for a discriminatory level of regulation and, further, required that all abortions performed in Illinois be performed in a hospital, or its functional equivalent—an ASTC. Plaintiffs thus alleged that the laws violated plaintiffs' right of privacy as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution and the penumbra of the Bill of Rights. Plaintiffs also alleged that the challenged provisions deprived Dr. Ragsdale and other physicians of their asserted right to practice medicine free from vague, arbitrary, irrational and burdensome regulations, in violation of the equal protection clause of the Fourteenth Amendments to the Uni-

ted States Constitution, and that the provisions similarly prevented Margaret Moe from operating her facility free from vague, arbitrary, irrational and burdensome regulations, in violation of the equal protection clause of the Fourteenth Amendment. Plaintiffs sought declaratory and injunctive relief from the enforcement of the challenged provisions.

Defendants filed an Answer which denied each and every allegation of the Complaint, except as otherwise responded to. Defendants specifically denied each and every allegation that the laws, as written or as enforced, violated any of plaintiffs' rights guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. Defendants argued that the challenged statutes and regulations reflected accepted medical, health, safety, and construction standards for outpatient surgical facilities. In addition, defendants contended that the challenged provisions appropriately furthered the State's interests in protecting the health, safety and welfare of women who choose to have abortions in such facilities

D. The Preliminary Injunction

Following an evidentiary hearing and a review of the pleadings and other written evidence submitted by the parties, this Court granted plaintiffs' Motion for a Preliminary Injunction in orders issued on November 27, 1985 and on December 11, 1985. The Court enjoined the defendant class members and the individual defendants Bernard J. Turnock, Neil F. Hartigan, and Gary Clayton (hereafter collectively referred to as "defendants"), in their official capacities, and defendants' successors, officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, from enforcing section 4433 (1) (a)-(e) (now section 22 (1) (a)-(e)) of the MPA, the

ASTC Act and any rules and regulations promulgated thereunder, or the HFP Act, against any person or facility to the extent such person or facility offers or performs, or desires to offer or perform first or early second trimester abortions or other abortion-related gynecological procedures, such as a dilation and curettage.

On March 10, 1988, the United States Court of Appeals for the Seventh Circuit upheld the Preliminary Injunction, except insofar as the challenge to one provision was determined to be moot. The Court of Appeals subsequently denied defendants' petition for rehearing and suggestion for rehearing en banc on August 12, 1988.

Thereafter, defendants Turnock, Hartigan, and Stephen Selcke, then-director of the Department of Professional Regulation and successor to defendant Clayton, filed a Notice of Appeal, seeking review by the Supreme Court of the United States.

II. RESOLUTION OF DISPUTED ISSUES

This Consent Decree is the result of negotiation and settlement. Defendants deny the allegations in the Complaint and specifically deny that the challenged provisions and their enforcement of them violates the constitutional or other legal rights of the plaintiff classes. Nothing herein shall be considered an admission of fault of any kind by the defendants, nor shall anything herein be considered a reflection of any weakness of proof by the plaintiffs.

The parties are desirous of avoiding further protracted and costly litigation and therefore have agreed that this controversy should by resolved by settlement and without further evidentiary hearings. In addition, the defendants desire to expeditiously regain the State's authority to license

and regulate outpatient surgical facilities in which abortions are performed and to implement and enforce regulations as to such facilities. Accordingly, as indicated by the signatures below, the parties have agreed to the entry of this Consent Decree.

This Consent Decree and judgment shall constitute a final resolution of all of the claims for declaratory and injunctive' relief asserted in the complaint, with the reservation of plaintiffs' claims for attorney's fees, costs, and expenses, and shall be binding upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them, including: the defendants, their agents and employees, and their successors in office, the defendant class of state's attorneys, and upon the named plaintiffs and all persons in the classes they represent. The plaintiffs' entitlement to, and the amount of, any counsel fees and reimbursement of costs and expenses shall be determined by the Court upon proper application by the plaintiffs after entry of this Decree. Defendants retain their right to object to such application submitted by plaintiffs. The parties also may resolve the plaintiffs' claim to fees, costs and expenses by agreement.

Plaintiffs and defendants agree to the dissolution of the Preliminary Injunction and to the entry of this Consent Decree as a Permanent Injunction.

III. FINDING OF FAIRNESS AND ADEQUACY

The Court, having held a hearing pursuant to court-ordered notice to the plaintiff and defendant classes in accordance with Rule 23(e) of the Federal Rules of Civil Procedure, hereby finds that the terms of this Consent Decree provide for a fair, adequate, and reasonable settle-

ment of the claims for declaratory and injunctive relief asserted in the complaint, with the exception of plaintiffs' claims for attorney's fees, costs and expenses. The Court thereby dissolves the Preliminary Injunction and enters this Consent Decree as a Permanent Injunction, the injunctive terms of which are set forth in section IV.

IV. JUDGMENT AND PERMANENT INJUNCTION

NOW, THEREFORE, upon the consent of the parties and approval of this Court, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

[SEE ATTACHMENT A FOR THE INJUNCTIVE PORTION OF THIS CONSENT DECREE]

V. COMPLIANCE

Class members shall be given at least 6 months from the date of approval of this Consent Decree to bring their facility into compliance with the terms of the Consent Decree or any new regulations promulgated by the Department of Health, pursuant to this decree, governing the provision of abortion services.

ORDERED THIS 22 day of March, 1990.

ENTER:/s/ John A. Nordberg
United States District Judge

Approved:

One of the Attorneys for
the Plaintiff Class:
/s/ Colleen K. Connell

Bernard J. Turnock, M.D.,
Director, Illinois
Department of Public Health

Defendant Neil F. Hartigan
Attorney General of Illinois

One of the Attorneys for
Cecil A. Partee State's Attorney
of Cook County and the defendant
class of State's Attorneys

Kevin K. Wright,
Director, Illinois
Department of Professional
Regulation

ATTACHMENT A

INJUNCTION PORTION OF CONSENT DECREE

1. Defendants, in their official capacities, their successors in office, their officers, agents, servants, contractors, employees and attorneys, and those people in active concert and participation with them, are hereby enjoined from initiating any prosecution, including but not limited to criminal, civil and administrative proceedings, or imposing any sanction for violation of, or enforcing in any way, any of the statutes set forth in subparagraphs (A) and (B) below against any person or facility offering or performing abortions:

A. Section 157-8.3(A) (section 3) of the Ambulatory Surgical Treatment Center Act ("ASTC Act"), Ill. Rev. Stat. ch. 111-1/2, pars. 157-8.3(A), to the extent that Ambulatory Surgical Treatment Center is defined as any facility in which a medical or surgical procedure is utilized to terminate a pregnancy.

B. Section 22(1)(a)-(e) of the Medical Practice Act. Ill. Rev. Stat. ch. 111.

2. Defendants, in their official capacities, their successors in office, their officers, agents, servants, contractors, employees and attorneys. and those people in active concert and participation with them, are hereby enjoined from initiating any prosecution, including but not limited to criminal, civil and administrative proceedings, or imposing any sanction for violation of, or enforcing in any way, against any licensed Ambulatory Surgical Treatment Center ("ASTC"), the following provisions of the Ambulatory Surgical Treatment Center Licensing Requirements, 77 Ill. Admin. Code, Section 205, subchap. b: (1) 205.710, (2) 205.720, (3) 205.730(a)(3) and (b), (4) 205.740, and (5) 205.760, and, if such facility provides only abortions and related gynecological procedures, (6) 205.120(b)(5)-(7), and (7) 205.125(b)(5)-(7), to the extent that, provided that all information required under said sections is maintained at the ASTC, the application required by said sections need only include the name, address or telephone number of the owner(s), administrator(s) and medical director(s) of the ASTC.

3. Defendants, in their official capacities, their successors in office, their officers, agents, servants, contractors, employees and attorneys, and those people in active concert and participation with them, are hereby enjoined from initiating any prosecution, including but not limited to cri-

minal, civil and administrative proceedings, or imposing any sanction for violation of, or enforcing in any way, any of the statutes or regulations set forth in subparagraphs (A) and (B) below against any person or facility offering or performing abortions within 18 weeks assessed gestational age, with only local, and not general, epidural, or spinal anesthesia, without incisions or other techniques which expose a person to risk of infection from airborne bacteria, and gynecological procedures related to such abortions, in an ASTC whose surgical procedures are limited to the performance of such abortions and gynecological procedures related to such abortions:

A. Sections 1152-1168 of the Health Facilities Planning Act, Ill. Rev. Stat. ch. 111-1/2, pars. 1152-1168.

B. The following provisions of the Ambulatory Surgical Treatment Center Licensing Requirements, 77 Ill. Admin. Code, Section 205, subchap. b:

(1) 205.120(b)(5)-(7) - Licensure, enjoined to the extent that, provided that all information required under said section is maintained at the ASTC, the application need only include the name, address or telephone number of the owner(s), administrator(s) and medical director(s) of the ASTC.

(2) 205.125(b)(5)-(7) - Application for License Renewal, enjoined to the extent that, provided that all information required under said section is maintained at the ASTC, the application need only include the name, address or telephone number of the owner(s), administrator(s) and medical director(s) of the ASTC.

(3) 205.520(c) - Preoperative Care, enjoined to the extent said section requires tests to be performed by a quali-

fied laboratory technician. (Relevant legal requirements regarding laboratory tests are found in the Clinical Laboratory Act, Ill. Rev. Stat. ch. 111-1/2, Sections 621-103 et seq.)

(4) 205.330 - Nursing Personnel, enjoined to the extent that "surgical experience" as used in said section may be interpreted to exclude experience gained in a clinical facility providing abortion procedures.

(5) 205.410(c) - Equipment, enjoined to the extent that said section requires an ASTC that does not use inhalation anesthetic or medical gas to have written procedures to insure the safety in use or storage of such substances, provided that if intravenous sedation is used in accordance with the ASTC's program narrative, mechanical ventilation devices and intubation equipment must be available on site.

(6) 205.540(c)(1)-(3) - Post Operative Care, enjoined to the extent the requirements of said section would apply in circumstances where (1) no licensed hossital within 15 minutes from the ASTC ("nearby hospital") will allow admitting or practice privileges to abortion providers and (2) either the ASTC has a transfer agreement with a nearby hospital, or a physician practicing at the ASTC or the medical director of the ASTC has a professional working relationship or agreement, maintained in writing at the ASTC and verifiable by IDPH, with a physician who does have admitting or practice privileges at a nearby hospital, so as to assure availability of patient care in the event of medical complications ensuing from an abortion or a gynecological procedure related to an abortion.

(7) 205.710 - Abortions, enjoined.

(8) 205.720 - Personnel, enjoined.

(9) 205.730 - General Patient Care, 730(a)(1), enjoined to the extent that said section requires any examination beyond a determination of the patient's blood Rh factor; 730(a)(3), enjoined; and 730(b), enjoined.

(10) 205.740 - Pre-operative Requirements, enjoined.

(11) 205.760 - Reports, enjoined.

(12) 205.1310(a) - Plant and Service Requirements, enjoined to the extent that said section requires that a proposed ASTC meet any requirements enjoined or not permitted pursuant to the provisions of this decree.

(13) 205.1320 (a)(1) - General Considerations, enjoined to the extent that said section requires any physical marking that denotes the facility as an ASTC.

(14) 205.1350 - Admission Department and Public Areas, enjoined, provided that the ASTC complies with all applicable federal and state handicap access laws, including, without limitation, the Illinois Environmental Barriers Act, Ill. Rev. Stat. ch. 111-1/2, Section 3711.

(15) 205.1360 - Clinical Facilities, 1360(a)(1) [examination room], enjoined to the extent said section would require that the examination room (which need not be separate from the procedure room) be larger than minimally adequate to accommodate the equipment required for the examination, to facilitate the examination safely, and to allow unobstructed ingress and egress to and from the room through the door that, if locked, can be opened from within the room;

.1360(b)(1) [procedure room], enjoined to the extent said sec-

tion would require a room larger than 120 square feet with a minimum dimension of at least 10 feet unless the ASTC demonstrates that a smaller room size is minimally adequate to accommodate all equipment required for the procedures, to perform the procedures safely, and to protect patients and staff in the event of fire or other emergency;

.1360(b)(2) [communication system], enjoined;

.1360(c)(2) [recovery room], enjoined to the extent said section would require a room larger than is necessary to accommodate the recovery beds or lounge chairs in the room, with a minimum of three feet between each bed or chair and an unobstructed passageway of a minimum of four feet clearance at one end each bed or chair;

.1360(c)(3) [drug distribution station, hand washing facility, charting facility, nurses' station and storage space for supplies and equipment], enjoined except that the ASTC must provide for direct visual supervision of the patients' recovery area;

.1360(c)(4) [toilet specifications], enjoined to the extent said section would require the inclusion of a toilet, a gray diverter valve or a fluid waste disposal in the recovery room if a toilet is reserved for only patient use and does not require recovery room patients to enter public areas or other patient care areas to access the toilet; and

.1360(c)(7) [minimum of four recovery beds or lounge chairs], enjoined to the extent said section would require the inclusion of more than three recovery beds or lounge chairs for each procedure room unless the ASTC's narrative program provides that no more than two Procedures per hour will be performed per procedure room, in which case a minimum of two recovery beds or lounge chairs for each procedure

room is required.

(16) 205.1370 - Support Services,

.1370(a) [control station], enjoined;

.1370(d) [scrub stations], enjoined to the extent said section requires a separate scrub station outside of the procedure room, provided that the procedure room contains a sink with handwashing capabilities;

.1370(e) [soiled workroom], enjoined to the extent that the section requires more than closed clean storage which prevents contamination by soiled materials and for separate storage and handling of soiled materials;

.1370(f) [fluid waste disposal], enjoined to the extent said section requires more than a toilet with a gray diverter valve, a sink exclusively used for fluid waste disposal, or a separate fluid waste disposal unit;

.1370(g) [workroom or supply room], enjoined to the extent said section requires more than facilities for closed clean storage;

.1370(h) [anesthesia storage], enjoined;

.1370(i) [medical gas storage], enjoined;

.1370(k) [changing areas -- staff], enjoined to the extent that the section requires more than minimally adequate space for any changing or gowning required by the specific procedures that are being performed in accordance with the ASTC's narrative program;

.1370(l) [changing areas -- patients], enjoined; and

.1370(n) [janitor's closet], enjoined to the extent that the section requires more than minimally adequate space for storage of cleaning supplies.

(17) 205.1380(b)(3) and (4) - Diagnostic Facilities, enjoined.

(18) 205.1400 - Details and Finishes,

.1400(a)(1) [minimum corridor width], enjoined to the extent said section would require that the width of corridors in an ASTC exceed five feet;

.1400(b)(3) [minimum door width], enjoined to the extent said section would require that the width of any doors in an ASTC exceed three feet;

.1400(d) [thresholds flush], enjoined, provided that the ASTC complies with all applicable federal and state handicap access laws, including, without limitation, the Illinois Environmental Barriers Act, Ill. Rev. Stat. ch. 111-1/2 Section 3711;

.1400(n) [ceiling .finish], enjoined to the extent said section requires ceilings to be readily washable and without crevices, if ceilings are otherwise cleanable;

(19) 205.1410(d)(1) - Construction, Including Fire-Resistive Requirements, enjoined, provided that the ASTC complies with all applicable federal and state handicap access laws, including, without limitation, the Illinois Environmental Barriers Act, Ill. Rev. Stat. ch. 111-1/2 Section 3711.

(20) 205.1540(a)-(q) and Table A = Air conditioning, Heating and Ventilating Systems, enjoined to the extent

that said section requires more than that temperature be maintained between 68° and 80° Fahrenheit.

(21) 205.1750(b) - Receptacles, enjoined.

4. Following the entry of the Consent Decree, (1) defendants may enforce those specific portions of the Medical Practice Act ("MPA"), the Health Facilities Planning Act ("HFPA"), and the Ambulatory Surgical Treatment Center Act ("ASTCA") not enjoined herein; (2) defendants shall not enforce Section 22(1)(a)-(e) of the MPA as presently codified; (3) defendants' enforcement and non-enforcement of Sections 1152-1168 of the HFPA as presently codified shall be consistent with the injunctions set forth in paragraphs 1 through 3 above; and (4) defendants' future regulation under and enforcement and non-enforcement of the present provisions of the ASTCA shall be consistent with the injunctions and specifications in paragraphs 1 through 3 above, and further shall be limited as follows:

(A) With respect to any person or facility that offers or performs abortions in any ASTC described in paragraphs 2 and 3 above, defendants may promulgate and enforce regulations implementing the requirements of paragraphs 2 and 3 above ("implementing regulations");

(B) With respect to any person or facility that offers or performs abortions in any ASTC described in paragraph 3 above, defendants may promulgate, implement and enforce future regulations under the ASTCA, which are different from and additional to the requirements in paragraph 3 and the implementing regulations ("paragraph 3 future regulations") only when a change in medical or scientific knowledge requires paragraph 3 future regulations in order to insure against a significant health or safety risk to the welfare of a woman undergoing an abortion as permitted in

such ASTC, and further provided that no paragraph 3 future regulations shall (i) restrict access to the procedure, either by materially increasing the cost of the procedure or materially reducing the number of facilities without resulting in more than a marginal increase in safety; (ii) interfere with the safety of the procedure as determined by accepted medical practice; or (iii) prevent a physician from exercising medical discretion, within accepted medical practice and within the scope of the facility, to provide a patient with appropriate care given the unique circumstances presented by her health situation; and

(C) With respect to any person or facility performing an abortion in any ASTC described in paragraph 2 above, defendants may promulgate, implement and enforce future regulations which govern all such ASTCs ("paragraph 2 future regulations"), however, if any paragraph 2 future regulations are specifically directed at the abortion procedure, as opposed to all procedures done in such facility, defendants may promulgate, implement and enforce such paragraph 2 regulations only when a change in medical or scientific knowledge requires paragraph 2 future regulations in order to insure against a significant health or safety risk to the welfare of a woman undergoing an abortion as permitted in such ASTC, and further provided that no paragraph 2 future regulations shall (i) restrict access to the procedure, either by materially increasing the cost of the procedure or materially reducing the number of facilities without resulting in more than a marginal increase in safety; (ii) interfere with the safety of the procedure as determined by accepted medical practice; or (iii) prevent a physician from exercising medical discretion, within accepted medical practice and within the scope of the facility to provide a patient with appropriate care given the unique circumstances presented by her health situation.

5. With respect to the number of weeks assessed gestational age set forth in paragraph 3 and 4 above, the parties stipulate that said figure has been determined by the Illinois Department of Public Health and is based on an assessment of risk to the health and safety of women as evidenced by available published data, present surgical and medical procedures commonly used and constituting acceptable medical practice, and the standards and guidelines of professional medical and health organizations. Following the entry of this Consent Decree, the plaintiffs and the Director of the IDPH expressly reserve the right to seek modification by the Court of said figure upon a showing that the further development of medical or scientific knowledge, including the basis of assessment set forth above, evidences that abortions and related gynecological procedures may be or should be performed within a different number of weeks in the facilities defined in paragraph 3, on the basis that such a change would not pose or will eliminate a significant risk to the health or safety of women obtaininq such services.

6. The Court retains jurisdiction to enforce compliance with the provisions of this Consent Decree.

* * *

APPENDIX D

(Entered March 22, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

JUDGMENT

Judgment is entered as follows: Enter memorandum opinion and order finding the proposed consent decree lawful, fair, reasonable and adequate. Accordingly, the court grants the parties' joint motion for approval of the settlement, and enters the consent decree herewith. (For further detail see order attached to the original minute order form).

ENTER: /s/ John A. Nordberg
United States District Judge

Dated: March 22, 1990

APPENDIX E

(Entered March 5, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, ey al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

ORDER

Court denies Petition to Intervene and to maintain Class Action of Baby Reed and Baby Aughenbaugh but grants Kenneth Reed and Mark Aughenbaugh leave to appear as Amicus Curiae and grants Craig H. Greenwood leave to file his appearance as their counsel, nunc pro tunc to February 22, 1990.

ENTER: /s/ John A. Nordberg
United States District Judge

Dated: March 5, 1990

APPENDIX F

(Entered April 19, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

ORDER

Hearing held on Craig H. Greenwood, attorney for Ritaellen M. Murphy and Penny R. Greenwood's petition to clarify. Per oral ruling court denies Craig H. Greenwood's petition to file his appearance. Court supplements the memorandum opinion and order stating that additional time to February 13, 1990 was given to file objections.

ENTER: /s/ John A. Nordberg
United States District Judge

Dated: April 19, 1990

APPENDIX G

(Filed April 20, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

NOTICE OF APPEAL

Notice is hereby given that KENNETH M. REED, as Expectant Father and Next Friend of BABY REED, and MARK I. AUGHENBAUGH, as Expectant Father and Next Friend of BABY AUGHENBAUGH, proposed Intervenors as of right, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the MINUTE ORDER dated and entered in this action on the 5th day of March, 1990, and MEMORANDUM OPINION AND ORDER dated and entered in this action on the 22nd day of March, 1990.

Respectfully submitted,
/s/ Kenneth M. Reed
/s/ Mark I. Aughenbaugh

APPENDIX H

(Filed April 20, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

NOTICE OF APPEAL

Notice is hereby given that RITAELLEN M. MURPHY and PENNY R. GREENWOOD, members of the Plaintiff class consisting of all Illinois women of child-bearing age who desire or may desire an abortion sumetime in the future, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the MEMORANDUM OPINION AND ORDER dated and entered in this action on the 22nd day of March, 1990.

Respectfully submitted,
/s/ Ritaellen M. Murphy
/s/ Penny R. Greenwood

APPENDIX I

(Filed May 18, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

NOTICE OF APPEAL

Notice is hereby given that KENNETH M. REED, as Expectant Father and Next Friend of BABY REED, and MARK I. AUGHENBAUGH, as Expectant Father and Next Friend of BABY AUGHENBAUGH, proposed Intervenors as of right, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the MINUTE ORDER dated and entered in this action on the 5th day of March, 1990, MEMORANDUM OPINION AND ORDER dated and entered in this action on the 22nd day of March, 1990, and the minute order entered on the 19th day of April, 1990.

Respectfully submitted,
/s/ Kenneth M. Reed
/s/ Mark I. Aughenbaugh

APPENDIX J

(Filed May 18, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

NOTICE OF APPEAL

Notice is hereby given that RITAELLEN M. MURPHY and PENNY R. GREENWOOD, members of the Plaintiff class consisting of all Illinois women of child-bearing age who desire or may desire an abortion sumetime in the future, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the MEMORANDUM OPINION AND ORDER dated and entered in this action on the 22nd day of March, 1990, and the minute order entered on the 19th day of April, 1990.

Respectfully submitted,
/s/ Ritaellen M. Murphy
/s/ Penny R. Greenwood

APPENDIX K

(Entered May 21, 1990)

IN THE UNITED STATES COURT OF APPPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

Nos. 90-1907 and 90-1908

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 85 C 6011 - John A. Nordberg, Judge

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

Counsel for all parties are ordered to meet with the court's Senior Staff Attorney, Donald J. Wall, in the court's Auxiliary Courtroom at 9:00 a.m. on May 31, 1990 to discuss coordinating the briefing in order to avoid burdening the court with duplicative briefs.

Briefing on the merits shall be HELD IN ABEYANCE pending further court order of this court.

APPENDIX L

(Entered June 7, 1990)

IN THE UNITED STATES COURT OF APPPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

Nos. 90-1907, 90-1908, 90-2122 and 90-2123

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 85 C 6011 - John A. Nordberg, Judge

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

On May 31, 1990, the parties to these appeals had a conference with Donald J. Wall, Senior Staff Attorney for the Court; a telephone conference call with the same parties was held on June 4, 1990. As a result, the following matters were agreed to, and IT IS SO ORDERED:

The briefing schedule is as follows:

1. The appellants shall file their joint consolidated brief and required short appendix on or before July 9, 1990.

2. The appellees shall filed their respective consolidated briefs on or before August 15, 1990.

3. The appellants shall file their joint consolidated reply brief, if any, on or before September 5, 1990.

Counsel for appellees are encouraged to avoid unnecessary duplication by filing a joint brief or a joint appendix or by adopting parts of a co-appellee's brief. Duplicative briefing will be striken and may result in disciplinary sanctions against counsel.

NOTE: The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.

APPENDIX M

(Entered July 9, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

No. 85 C 6011 - Judge Nordberg

ORDER

Hearing held on Craig Greenwood's motion for leave to supplement the record on appeal. Per oral ruling, court denies motion to supplement the record.

APPENDIX N

(Entered August 20, 1990)
(Corrected August 22, 1990)

IN THE UNITED STATES COURT OF APPPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

Nos. 90-1907, 90-1908, 90-2122 and 90-2123

RICHARD M. RAGSDALE, M.D., et al.,

Plaintiffs,

v.

BERNARD J. TURNOCK, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 85 C 6011 - John A. Nordberg, Judge

ORDER

Before Hon. WILLIAM J. BAUER, Chief Judge, Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. HARLINGTON WOOD, JR., Circuit Judge, Hon. RICHARD D. CUDAHY, Circuit Judge, Hon. RICHARD A. POSNER, Circuit Judge, Hon. JOHN L. COFFEY, Circuit Judge, Hon. JOEL M. FLAUM, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge.

This matter comes before the court for its consideration of the "SUGGESTION FOR HEARING EN BANC" filed herein on August 1, 1990, by counsel for the appellants. Upon consideration by the active members of this court.*

IT IS ORDERED that the Suggestion for Hearing En Banc is DENIED.

*Judge Ripple took no part in this matter.

APPENDIX O

August 15, 1990 Amendments to Ambulatory Surgical Treatment Center Licensing Requirements, 77 Ill.Adm.Code, Ch. 1, Sec. 205

DEPARTMENT OF PUBLIC HEALTH

NOTICE OF ADOPTED AMENDMENTS

TITLE 77: PUBLIC HEALTH
CHAPTER I: DEPARTMENT OF PUBLIC HEALTH
SUBCHAPTER b: HOSPITAL AND AMBULATORY CARE FACILITIES

PART 205
AMBULATORY SURGICAL TREATMENT CENTER LICENSING REQUIREMENTS

SUBPART A: GENERAL

Section
205.110 Definitions
205.115 Incorporated and Referenced Materials
205.118 Conditions of Licensure
205.120 Application for Initial Licensure
205.125 Application for License Renewal
205.130 Approval of Surgical Procedures

SUBPART B: OWNERSHIP AND MANAGEMENT

Section
205.210 Ownership, Control and Management

SUBPART C: PERSONNEL

SUBPART D: EQUIPMENT, SUPPLIES, AND FACILITY MAINTENANCE

SUBPART E: GENERAL PATIENT CARE

SUBPART F: RECORDS AND REPORTS

SUBPART G: LIMITED PROCEDURE SPECIALTY CENTERS ~~ADDITIONAL REQUIREMENTS FOR FACILITIES IN WHICH OBSTETRICAL/GYNECOLOGICAL PROCEDURES ARE PERFORMED~~

SUBPART H: PROCEDURES FOR INVESTIGATION OF COMPLAINTS

SUBPART I: BUILDING DESIGN, CONSTRUCTION STANDARDS, AND PHYSICAL REQUIREMENTS

SUBPART J: MECHANICAL

SUBPART K: PLUMBING AND OTHER PIPING SYSTEMS

SUBPART L: ELECTRICAL

205.1760 Grounding
205.1770 Equipment Installation in Special Areas
205.1780 Emergency Electric Service
205.1790 Fire Alarm System

205.TABLE A General Pressure Relationships and Ventilation Rates of Ambulatory Surgery Area

AUTHORITY: Implementing and authorized by the Ambulatory Surgical Treatment Center Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 157-8.1 et seq.)

SOURCE: Amended July 18, 1974; emergency amendment at 3 Ill. Reg. 10. p. 43. effective February 23, 1979, for a maximum of 150 days; amended at 3 Ill. Reg. 30, p. 371, effective July 23, 1979; amended at 5 Ill. Reg. 12756, effective November 4, 1981; amended at 6 Ill. Reg. 6220, 6225, and 6226, effective May 17, 1982; amended at 6 Ill. Reg. 10974, effective August 30, 1982; amended at 6 Ill. Reg. 13337, effective October 20. 1982; amended at 7 Ill. Reg. 7640, effective June 14, 1983; codified at 8 Ill. Reg. 9367; amended at 9 Ill. Reg. 12014, effective July 23. 1985; amended at 10 Ill. Reg. 8806, effective June 1, 1986; amended at 10 Ill. Reg. 21906, effective January 15, 1987; amended at 11 Ill. Reg. 14786, effective October 1, 1987; amended at 12 Ill. Reg. 3743. effective February 15, 1988; amended at 12 Ill. Reg. 15573, effective October 1, 1988;

amended at 13 Ill. Reg. 16025. effective November 1, 1989; emergency amended at 14 Ill. Reg. 5596, effective March 26, 1990, for a maximum of 150 days; amended at 14 Ill. Reg. ____, effective August 15, 1990.

NOTE: Capitalization denotes statutory language.

SUBPART A: GENERAL

Section 205.120 Application for Initial Licensure

a) AN APPLICATION FOR LICENSE SHALL BE MADE TO THE DEPARTMENT ON FORMS PROVIDED BY THE DEPARTMENT (Section 5 of the Act). The application shall be submitted not less than sixty days prior to the date of intended operation and shall contain the information required under the Act and this Part.

b) The initial application shall include the following information:

1) The names and addresses of all persons who own the facility, any names under which any of these persons do business. and the type of ownership of the facility (for example, individual, partnership, corporation, or association). In addition, a corporation shall submit:

A) A copy of its certificate of incorporation.

B) A list of the title, name and address of each of its corporate officers.

C) A list of the name and address of each of its shareholders holding more than five percent of the shares.

2) The names and addresses of all persons under contract to manage or operate the facility.

3) The location of the facility.

4) Information regarding any conviction of the applicant, or if the applicant is a firm, partnership or association, of any of its members, or if the applicant is a corporation, of any of its officers or directors, or of the person designated to manage or supervise the facility, of a felony, or of two or more misdemeanors involving moral turpitude in the last five years.

5) The name, address, telephone number, education, experience, credentials and any professional licensure or certification of the following persons:

A) Administrator.

B) Medical Director.

C) Supervising Nurse.

6) A list of the medical staff including name, ~~address, telephone number,~~ specialty and license number.

7) A list of all staff personnel including name, ~~address, telephone number,~~ position, education, experience, and any professional licensure or certification.

8) A narrative description of the facility including but not limited to interviewing, examination, surgi-

cal and recovery room facilities.

9) A description of services to be provided by the facility including a list of surgical procedures to be performed subject to approval in accordance with the requirements of Section 205.130.

10) Documentation of compliance with Section 205.350 of this Part. ~~The name, address, education, experience and certification of the qualified medical technician who will perform required laboratory procedures or a copy of the written agreement with a laboratory, licensed by the Department, to perform the required laboratory procedures.~~

11) A copy of the transfer agreement with a licensed hospital within approximately 15 minutes travel time of the facility or other documentation demonstrating compliance with Section 205.540(d) ~~(c)~~ of this Part.

12) A copy of the organizational plan of the facility (see Section 205.220).

13) Schematic architectural plans.

14) Documentation of a permit as required by the Illinois Health Facilities Planning Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1151 et seq.)

15) Documentation of compliance with all applicable local building, utility, and safety codes.

c) THE APPLICATION SHALL BE SIGNED BY THE APPLICANT AND SHALL INCLUDE A VERIFICATION form acknowledging the application to be true and complete

and certifying that the applicant has knowledge of and understands the action required to comply with the Act and licensing requirements. THE FORM SHALL BE VERIFIED by a notary public. (Section 5 of the Act)

d) THE LICENSE APPLICATION SHALL BE ACCOMPANIED BY A LICENSE FEE OF $500. (Section 5 of the Act)

(Source: Amended at 14 Ill. Reg. _____, effective August 15, 1990)

Section 205.125 Application for License Renewal

a) Application for license renewal shall be submitted on forms provided by the Department. Application for license renewal shall be submitted to the Department not less than 30 days prior to the expiration date.

b) An application for license renewal shall include the following information:

1) The names and addresses of all persons who own the facility, any names under which any of these persons do business, and the type of ownership of the facility (for example, individual, partnership, corporation, or association). In addition, a corporation shall submit:

A) A list of the title, name and address of each of its corporate officers.

B) A list of the name and address of each of its shareholders holding more than five percent of tha shares.

2) The names and addresses of all persons under

contract to manage or operate the facility.

3) The location of the facility.

4) Information regarding any conviction of the applicant, or if the applicant is a firm, partnership or association, of any of its members, or if the applicant is a corporation, of any of its officers or directors, or of the person designated to manage or supervise the facility, of a felony, or of two or more misdemeanors involving moral turpitude during the previous year.

5) The name, address, and telephone number of the administrator, medical director, and supervising nurse. In addition. the education, experience, credentials and any professional licensure or certification of these individuals must also be submitted if this information was not submitted with the initial application or a prior renewal application or if this information has changed since the prior submission.

6) A list of the medical staff including name, ~~address, telephone number,~~ specialty and license number.

7) A list of all staff personnel including name, ~~address, telephone number,~~ position, education, experience, and any professional licensure or certification.

8) A list of surgical procedures being performed at the facility. Any new procedures which are included in this list must be identified and are subject to approval in accordance with the requirements of Section 205.130.

c) THE APPLICATION SHALL BE SIGNED BY THE

APPLICANT AND SHALL INCLUDE A VERIFICATION form acknowledging the application to be true and complete and certifying that the applicant has knowledge of and understands the action required to comply with the Act and licensing requirements. THE FORM SHALL BE VERIFIED by a notary public. (Section 5 of the Act)

d) The license renewal application shall be accompanied by A LICENSE RENEWAL FEE OF $300. (Section 6 of the Act)

(Source: Amended at 14 Ill. Reg. ____, effective August 15, 1990)

SUBPART C: PERSONNEL

Section 205.350 Laboratory Services. ~~Ambulatory Surgical Treatment Center~~

Each ambulatory surgical treatment center shall meet each ~~have one~~ of the following requirements:

a) Compliance with the requirements of the Department's rules Illinois Clinical Laboratories Code (77 Ill. Adm. Code 450). ~~A qualified medical technician who is certified by the American Society of Clinical Pathologists or is the holder of a letter, certificate, or record from the Bureau of Quality Assurance of the Department of Health, Education, and Welfare that he/she has passed the Federal Proficiency Examination Program for Clinical Laboratory Technologists, to perform required laboratory procedures.~~

b) Have a ~~A~~ written agreement with a laboratory, ~~licensed by the Department~~ under the Department's rules Illinois Clinical Laboratories Code (77 Ill. Adm. Code 450), to perform any required laboratory procedures which are not performed in the center.

(Source: Amended at 14 Ill. Reg. ____, effective August 15, 1990)

SUBPART E: GENERAL PATIENT CARE

Section 205.520 Preoperative Care

a) Where medical evaluation, examination, and referral are made from a private physician's office, hospital, or clinic, pertinent records thereof shall be available and made part of the patient's clinical record at the time the patient is registered and admitted to the ambulatory surgical treatment center.

b) A complete medical history shall be obtained and the physical examination shall be complete. A preanesthetic evaluation shall be completed specifically identifying any patient sensitivity or contraindications to anesthesia.

c) A hemoglobin or hematocrit and examination of the urine for sugar, protein, and acetone shall be performed ~~by a qualified laboratory technician~~ prior to the following procedures:

1) those performed with general anesthesia,

2) those performed with intravenous sedation,

3) those performed with spinal or epidural anesthesia,

4) those performed with any other specific anesthesia technique designated by the consulting committee, and

5) those performed to terminate pregnancy.

d) Prior to procedures performed to terminate a pregnancy, the physician shall establish the diagnosis of pregnancy by appropriate clinical evaluation and testing. In addition, the patient's blood Rh factor shall be determined.

e) ~~d)~~ A written statement indicating informed consent and a signed authorization by the patient for the performance of the specific surgical procedure shall be procured and made part of the patient's clinical record.

f) ~~e)~~ Surgical procedures shall not be performed on patient's having medical, surgical, or psychiatric conditions or complications as specified by the consulting committee in the facility's written policies.

g) ~~f)~~ Prior to admission to the facility for a surgical procedure the patient shall be informed of the following:

1) Patients who receive general anesthesia, intravenous sedation, spinal or epidural anesthesia, or any other specific anesthesia technique designated by the consulting committee, must not attempt to drive a motor vehicle immediately upon discharge from the facility.

2) Patients must make arrangements prior to admission for safe transportation from the facility upon discharge to return to home or to a similar environment.

(Source: Amended at 14 111. Reg. ____, effective August 15. 1990)

Section 205.540 Postoperative Care

a) Patients shall be observed in the facility for a period of

time sufficient to ensure that the patient is awake, physiologically stable, manifests no immediate postoperative complications, and is ready to return to home or to a similar environment. No patient shall be required to leave the center in less than one (1) hour following the procedures.

b) Rh factor sensitization prophylaxis shall be provided to all Rh negative patients following procedures performed to terminate pregnancy, in accordance with standard medical procedure.

c) ~~d)~~ Patients in whom a complication is known or suspected to have ~~occured~~ occurred during or after the performance of a surgical procedure, shall be informed of such condition and arrangements made for treatment of the complication. In the event of admission to an inpatient facility a summary of care given in the ambulatory surgical treatment center concerning the suspected complication shall accompany the patient.

d) ~~e)~~ To insure availability of follow-up care at a licensed hospital, the ambulatory surgical treatment center shall provide written documentation of one of the following:

1) A transfer agreement with a licensed hospital within approximately fifteen (15) minutes travel time of the facility.

2) A statement that the medical director of the facility has full admitting privileges at a licensed hospital within approximately fifteen (15) minutes travel time and that he/she will assume responsibility for all facility patients requiring such follow-up care.

3) A statement that each staff physician, dentist, or

podiatrist has admitting privileges in a licensed hospital within fifteen (15) minutes travel time of the facility.

e) ~~f)~~ Written instructions shall be issued to all patients in accordance with the standards approved by the consulting committee of the ambulatory surgical treatment center and shall include the following:

1) Symptoms of complications associated with procedures performed.

2) Limitations and/or restrictions of activities of the patient.

3) Specific telephone number to be used by the patient at anytime should any complication or question arise.

4) A date for follow-up or return visit after the performance of the surgical procedure which shall be scheduled within six weeks.

f) ~~e)~~ Patients shall be discharged only on the written signed order of a physician. The name, or relationship to the patient, of the person accompanying the patient upon discharge from the facility shall be noted in the patient's medical record.

g) Information on availability of family planning services shall be provided, when desired by the patient, to all patients undergoing a pregnancy termination procedure. When, in the physician's opinion, it is in the best interests of the patient and with the patient's consent, family planning services may be initiated prior to the discharge of the patient.

(Source: Amended at 14 Ill.Reg. _____, effective August 15,
1990)

SUBPART G: LIMITED PROCEDURE SPECIALTY CENTERS ~~ADDITIONAL REQUIREMENTS FOR FACILITIES IN WHICH OBSTETRICAL/GYNECOLOGICAL PROCEDURES ARE PERFORMED~~

Section 205.710 Pregnancy Termination Specialty Centers ~~Abortions~~

~~Abortions shall be provided to the public with the same standards of safety, effectiveness, and regard for patients rights as any other health service.~~

a) A facility will be considered a pregnancy termination specialty center if it meets each of the following conditions:

1) Procedures performed at the facility are limited to procedures to terminate pregnancy performed within 18 weeks assessed gestational age (beginning on the first day of the last menstrual period), and other gynecoligic procedures related to the termination of pregnancy. Assessed gestational age may be determined by patient history or by clinical assessment.

2) The center does not use general, epitural, or spinal anesthesia for any of the procedures performed. If intravenous sedation is used, mechanical ventilation devices and intubation equipment must be available on site.

3) The program narrative and policies of the facility are limited to the performance of procedures to ter-

minate pregnancy and other procedures related to the termination of pregnancy.

b) The following exceptions and modification of the requirements of this Part apply to pregnancy termination specialty centers.

Pregnancy termination specialty centers shall comply with each of the requirements of this Part, unless specifically excepted or modified by the provisions of this subsection.

1) The initial and renewal application need only include the name, address, and telephone number of all owners, administrators, and medical directors of the center [in lieu of compliance with Section 205.120(b)(5) through (7) and Section 205.125(b)(5) through (7)]. However, the other information required in these provisions shall be maintained at the center and be available for inspection by the Department. The information shall include the original or notarized copies of credentials of all licensed or certified personnel.

2) Compliance with Section 205.540(d) is not required, if the medical director or a physician practicing at the facility has a professional working relationship or agreement, maintained in writing at the facility and verifiable by the Department, with a physician who does have admitting or practice privileges at a licensed hospital within 15 minutes from the facility and who will assume responsibility for all facility patients requiring such follow-up care.

3) The administrative and public areas of the facility are not required to comply with Section 205.1350.

4) A separate examination room is not required; however, adequate space shall be provided to accommodate any equipment necessary for examination, to perform examinations safely, and to allow unobstructed ingress and egress to and from the examination area [in lieu of compliance with Section 205.1360(a)(1)].

5) Each room in which procedures to terminate pregnancy are performed shall be at least 120 square feet in size with a minimum dimension of at least 10 least. Exceptions will be made when the center demonstrates that the room size is adequate to accommodate the equipment required for the procedures, to facilitate the performance of the procedures safely, and to protect the patients and staff in the event of fire or other emergency [in lieu of compliance with Section 205.1360(b)(1)].

6) A communications system between the control station and each procedure room is not required [in lieu of compliance with Section 205.1360(b)(2)].

7) Not less than three recovery beds or lounge chairs shall be required for each procedure room. However, if the facility's narrative program provides that no more than two procedures per hour will be performed per procedure room, then only two recovery beds or lounger chairs will be required for each procedure room. A minmum of three feet shall be provided between each recovery bed or lounge chair and an unobstructed passageway of a minimum of four feet shall be provided at one end of each bed or chair [in lieu of compliance with Section 205.1360(c)(2) and (c)(7)].

8) The recovery area is not required to include a

tion, or storage space for supplies and equipment [in lieu of compliance with Section 205.1360(c)(3)]. However, the facility shall provide for direct visual supervision of the recovery area for all patients.

9) A toilet for patient use must be in the recovery area, or in a location which does not require patients to enter public areas of other patient care areas in order to gain access from the recovery area. A gray diverter valve is not required on the toilet in the recovery area, if a means of fluid waste disposal is provided at another location within the center [in lieu of compliance with Sections 205.1360(c)(4) and 205.1370(f)].

10) A control station for the operating suite is not required [in lieu of compliance with Section 205.1370(a)].

11) A scrub station is not required outside the procedure room, if the procedure room contains a sink with handwashing capabilities [in lieu of compliance with Section 205.1370(d)].

12) A separate soiled workroom is not required; however, facilities shall be provided for closed clean storage which prevents contamination by soiled materials, and for storage and handling of soiled linens and other soiled materials. These procedures shall be described in the center's narrative program [in lieu of compliance with Section 205.1370(e) and (g)].

13) Anesthesia and medical gas storage facilities are not required [in lieu of compliance with Section 205.1370(h) and (i)].

14) A one-way traffic pattern through staff change areas is not required, but space shall be provided for any changing or gowning which is required by the specific procedures which are being performed in accordance with the center's narrative program [in lieu of compliance with Section 205.1370(k)].

15) A change area for patients is not required [in lieu of compliance with Section 205.1370(l)].

16) A separate janitor's closet for the surgical suite is not required, if the janitor's closet for the center is centrally located and contains space for the storage of supplies needed for cleaning both the surgical and non-surgical areas of the center [in lieu of compliance with Section 205.1370(n)].

17) A minimum corrider width of five feet and a minimum door width of three feet shall be provided for all corriders and for all doors which are accessible to the public or through which patients may need to be transported in an emergency [in lieu of compliance with Section 205.1400(a)(1), (b)(2), and (b)(3)].

18) The requirements of Section 205.1400(d) for flush thresholds and expansion joint covers do not apply.

19) Ceilings in procedure and recovery rooms must be cleanable, but are not required to be washable [in lieu of compliance with Section 205.1400(n)(1)].

20) The requirements for elevators in Sejction 205.1410(d)(1) do not apply.

21) Ventilation, air change, and air filter require-

ments do not apply; however, temperature shall be maintained in the facility between 68 and 80 degrees Fahrenheit [in lieu of compliance with Section 205.1540 and Table A].

22) The requirement for one duplex receptacle for each wall does not apply [in lieu of compliance with Section 205.1750(b)].

(Source: Section repealed, new Section adopted at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.720 Personnel (Repealed)

~~At least one registered professional nurse with postgraduate education or experience in obstetrical or gynecological nursing shall supervise and direct the nursing personnel and care of patients having obstetrical procedures.~~

~~AGENCY NOTE: Procedures involving the pregnant uterus are subject to particular complications and postopetrative care requires a special knowledge on the part of hursing staff.~~

(Source: Repealed at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.730 General Patient Care (Repealed)

~~a) Examination~~

~~1) Prior to obstetrical procedures blood Rh factor shall be determined by a qualified laboratory technician for every patient.~~

~~2) The physician performing an abortion procedure~~

~~shall establish the diagnosis of pregnancy by appropriate clinical evaluation and testing prior to performing an abortion procedure.~~

~~3) Time shall be allowed between the initial examination and termination of pregnancy to permit the reporting to and reviewing of all laboratory tests with the patient by the facility physician.~~

~~b) Counseling~~

~~1) Counseling shall be provided following disclosure to the patient of the diagnosis of pregnancy, and prior to performance of any surgical procedure. It shall be done individually and in a room designated for such use which shall not be the procedure room.~~

~~2) All facilities shall provide orientation training for counselors and insure that each counselor is qualified to:~~

~~A) Counseling shall be done by a person qualified to:~~

~~i) discuss alternatives for dealing with a unwanted pregnancy;~~

~~ii) describe the procedures used in the facility;~~

~~iii) explain the risks and possible complications of each procedure;~~

~~iv) provide contraception information.~~

~~B) Demonstration of such counseling qualifi-~~

~~cations shall be required by the Department.~~

~~C) Documentation of orientation training shall be required by the Department.~~

~~D) Counselors shall have no financial interest in the patient's decision.~~

~~3) Counseling shall include a discussion of alternatives, description of the procedure to be performed, explanation of risks and possible complications. Contraceptive information may be provided postoperatively. Group counseling may be provided in addition to individual counseling. The patient's clinical record shall include documentation of the counseling reqeived.~~

~~AGENCY NOTE: In the opinion of the Ambulatory Surgical Treatment Center Licensing Board, the patient should make a decision concerning the procedure in an atmosphere free from coercion. Consequently, the Board believes this is best accomplished in a room separate and apart from the procedure room. The Board believes that it is difficult to reach a truly voluntary decision while the patient is undressed and on the proceure table.~~

(Source: Repealed at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.740 Preoperative Requirements (Repealed)

~~Abortions may be performed in an ambulatory surgical treatment center on only those patients with gestation up to and including 12 weeks commencing with ovulation rather than computed on the basis of~~

~~the menstrual cycle, as determined by the physician, if the patient's medical condition permits. Abortions shall not be performed in an Ambulatory Surgical Treatment Center on those patients whose gestation exceeds 12 weeks.~~

(Source: Repealed at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.750 Postoperative Requirements (Repealed)

~~a) Each obstrical/gynecological service shall provided Rh factor sensitization prophylaxis to all Rh negative patients according to standard medical procedures.~~

~~b) Information on availability of family planning services shall be provided, when desired by the patient. When, in the physician's opinion, it is in the best interest of the patient and with the patient's consent, family planning services may be initiated prior to the discharge of the patient.~~

(Source: Repealed at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.760 Reports (Repealed)

~~a) A report of each abortion procedure performed in an ambulatory surgical treatment center shall be made to the Department on forms provided by it. These reports shall be submitted not later that ten (10) days following the month in which the abortion was performed. Reports shall be submitted on procedures performed whether or not the patient was pregnant.~~

~~b) Reports shall not be filled out in such a manner or at such a time as to avoid accurate reporting of complication.~~

~~c) If the facility becomes aware of a complication following the submission of the original report, then a supplemental report shall be submitted to the Department.~~

(Source: Repealed at 14 Ill.Reg. _____, effective August 15, 1990)

Section 205.1380 Diagnostic Facilities

~~If the pre-admission evaluation tests are to be performed within the facility, the following services shall be provided.~~

a) Radiographic suite, if radiography is provided in the center, shall contain the following:

1) film processing area

2) viewing and administration area

3) film storage facilities

4) toilet room with handwashing facilities, directly accessible from each fluoroscopy room without entering the general corrider area.

5) dressing area with convenient access to toilets.

b) If laboratory testing is performed in the center which required a permit or license under the Department s rules Illinois Clinical Laboratories Code (77 Ill.Adm.Code 450), the laboratory area of the center ~~Laboratory suite~~ shall contain the following minimum facilities:

1) Laboratory work counter with sink and vacuum, and electric services.

2) Lavatory or counter sink equipped for handwashing.

3) Storage cabinet or closet for any necessary laboratory supplies and equipment. This storage area may be combined with other storage areas in the center.

~~4) Specimen collection facilities equipped with a toilet and lavatory.~~

4) ~~5)~~ Blood collection facilities shall have space for a chair and work counter.

(Source: Amended at 14 Ill.Reg. _____, effective August 15, 1990)

(3)

No. 91-808

In The
Supreme Court of the United States
October Term, 1991

RITAELLEN M. MURPHY, R.N., et al.,
Petitioners,
vs.
RICHARD M. RAGSDALE, M.D., et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF CERTAIN ILLINOIS STATE'S ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLANTS

(each individual amicus is listed inside cover)

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The Honourable Mary Jo Hunt
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Knox County

The Honourable Mark C. Hunter
Massac County

The Honourable Charles C. Roberts
Richland County

The Honourable Charles R. Hartman
Stephenson County

Note: This *amicus* brief is being filed with the consent of all of the parties. Consents are on file in the Office of the Clerk.

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INTEREST OF THE AMICI

The *amici* are Illinois state's attorneys for certain counties in the State of Illinois. They are members of the defendant class of state's attorneys, the representative of whom is a respondent on the petition for a writ of certiorari in this case. The *amici* themselves did not wish to see the settlement proposal at issue here entered into; and the representative did not engage in settlement negotiations until ordered to do so by the court.

The interest of the *amici* is the greater because in this case, which will have a dramatic impact on us in our official capacities, no one has yet pointed out that as a matter of state law, the dissenting women are not seeking enforcement, and that even the respondents themselves didn't think that *Diamond v. Charles*, the case which the Seventh Circuit based it judgment on, applies here.

Further, our interest is heightened because this case goes far beyond the simple matter of health regulation. Since there would be no issue of the dissenting women's standing in state courts in Illinois, this case will be the most important case for federalism since *Erie v. Tompkins*.

The brief does not overlap with the arguments of the petitioners. In the interests of the Court's time and that of the clerks we have kept this brief as short as possible.

SUMMARY OF ARGUMENTS

We find as a matter of Illinois law that the dissenting women are not seeking enforcement. Doing so would be unlawful. Under state and federal law a presumption operates in favor of any person to the effect that he is not acting unlawfully. There is nothing in the record to even suggest that the dissenting women are attempting to do the unlawful act of seeking enforcement, let alone rebut that presumption.

The respondent women effectively conceded that the dissenting women have standing and that *Diamond v. Charles* is inapplicable. Counsel for the respondent women are the leading attorneys in this nation on the doctrine of *Diamond.* They themselves successfully argued that principle in *Diamond*, and yet they never once briefed or argued in reliance on *Diamond* in the appellate or district courts to even suggest that the dissenting women might not have standing. This was no oversight on their part; they knew that *Diamond* simply does not apply.

Assuming, *arguendo*, that the dissenting women lack standing under the rules as they might exist now, denying standing for purposes of objecting to an unlawful act and raising questions of subject matter jurisdiction would be as serious a breach of federalism as *Swift v. Tyson* was, which this Court overruled in *Erie v. Tompkins.*

Illinois law provides that when a court is faced with two questions of subject matter jurisdiction---the authority of the court to accept an unconstitutional act,

and the standing of the objectors to raise such objections---the court will first look to see if the act which it is asked to accept is one which the court may in fact lawfully accept. In this instance the District Court unlawfully adopted a void statutory scheme.

Another question raised by the proceedings is whether a party may be ordered to participate in settlement negotiations. On this issue the Seventh and Eleventh Circuits are in conflict with the Second and Eighth Circuits. When the Seventh Circuit, *en banc*, in a 6 to 5 decision held that district courts may do so, it ran contrary to the only established authority on point at that time---that of the Second and Eighth Circuits. Now the Eleventh Circuit has followed the rule of the Seventh Circuit. We ask this Court to resolve this conflict and hold that a district court may not order a party to participate in settlement negotiations.

Since all parties must agree to a settlement proposal, the District Court ordered our class representative to participate in the settlement negotiations over his objections. Pursuant to that court order our representative helped craft an illegal settlement proposal which the district court lacked subject matter jurisdiction to approve.

This illegality cannot, in fact, be remedied by a later collateral attack; such attacks are as extremely disfavored in the federal jurisdiction as they are in the courts of Illinois. And the expense which this case has already entailed is enough to crush our budgets. The costs of a collateral attack would be prohibitive.

As law enforcement officials we are obliged to uphold Illinois law while simultaneously paying heed to this Court's decisions which do override Illinois law.

Illinois provides by statute that unborn children are persons, and that if *Roe v. Wade* is ever overruled or modified, unborn children are automatically entitled to be protected against abortion except where the mother's life is endangered. Because this Court's recent decisions have modified *Roe*, Illinois unborn children are now entitled to have their standing under Illinois statutory and constitutional law recognized. Judge Posner recognized this right of Illinois unborn children to intervene throughout the appellate level.

Unfortunately, the Seventh Circuit erroneously held that the efforts of the proposed intervenors were an attempt to enforce statutory enactments duly enacted by the Illinois General Assembly. Although these enactments are the subject matter of this case in its earlier form as it already exists on this Court's docket (88-790), the illegal and unconstitutional settlement proposal is the only subject matter of the present certiorari petition (91-808).

Since unborn children are now entitled to have their standing recognized, they can now object to a void settlement proposal. The question is whether the modification of *Roe* is such that the several states are still precluded from establishing personhood for these unborn children? Only this Court can answer that question. As the chief executive and enforcement officers for our counties, we must know the answer to that question to enable us to enforce the appropriate laws correctly.

ARGUMENTS

I. DIAMOND V. CHARLES IS INAPPLICABLE

A. THE PETITIONERS ARE NOT SEEKING ENFORCEMENT

We find as a matter of Illinois law that the petitioners are not seeking enforcement, which would be unlawful.[1]

The petitioners are entitled to a presumption that they are not seeking to do an unlawful act. This presumption obtains under Illinois law and in the federal jurisdiction as well.[2]

There is nothing in the record to even suggest that the petitioners are seeking enforcement. Absent

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1. Enforcement is reserved for the Executive branch of Illinois state government. Illinois Constitution of 1970, Article V, Section 15 and Article II, Section 1. Illinois does follow the common law rule, though, that a private citizen may obtain injunctive relief against a public nuisance if the harm he suffers is different in kind from that of the public in general. *Joseph v. Wieland Dairy Co.*, 131 N.E. 94, 297 Ill. 574 (1921).

2. *Robinson v. Workman*, 137 N.E.2d 804, 808, 9 Ill.2d 420, 427 (1956); *TRW, Inc. TRW Michigan Division v. N.L.R.B.*, 393 F.2d 771 (6th Cir. 1968); *N.L.R.B. v. Shawnee Industries, Inc.*, 333 F.2d 221 (10th Cir 1964); *In re Las Colinas, Inc.*, 294 F.Supp. 582 (D. P.R. 1968).

evidence, the presumption that they are not seeking enforcement is not rebutted. We ask this Court to take notice of the fact that the Seventh Circuit does not make any reference to the record in stating the conclusion that the petitioners are seeking enforcement. But how could the court make such a reference? For there is nothing in the record to support such a conclusion.

The wind will not rebut a presumption. Something more solid than a mere statement to that effect is needed before a person may be deprived of a presumption to which he is entitled under the law.[3] A substantive basis must be presented to deprive one of a presumption; the record provides no such foundation.

B. THE DISSENTING WOMEN ARE TRYING TO DEFEND THEIR OWN INTERESTS

The dissenting women are trying to do what anyone in a federal or state class action may do: Defend their own interests.[4]

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3. *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329 (DC Cir. 1972); *Brown v. Brown*, 160 N.E. 149, 329 Ill. 198 (1928); 29 Am.Jur.2d Evidence Sections 122, 124-126, 130-131; ALR Digests Evidence, Sections 93 and 122.

4. *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991) (representative and counsel may be tempted to sell out class for their own benefit); *Roby v. St. Louis Southwestern Ry. Co.*, 775 F.2d 959 (8th Cir. 1985); *Griffin v. Carlin*, 755 F.2d 1516 (11 Cir. 1985); *National Ass'n of Regional Medical Programs v. Mathews*, 551 F.2d 340 (DC Cir 1976) *cert den.* 431 U.S. 954; *Miner v. Gillette Co.*, 428 N.E.2d 478, 87 Ill.2d 7 (1981), *cert. granted* 102 S.Ct. 1767, *cert. dismissed* 103 S.Ct. 484; *Fiorito v. Jones*, 384 N.E.2d 316, 74 Ill.2d 226 (1978).

The respondent women did not have to include the interests of the dissenting women if they didn't want to. But joining all women under the federal class action statute made their work easier for them by eliminating the need to proceed one plaintiff at a time against each defendant state's attorney.

Having chosen of their own volition to carve out a plaintiffs' class broad enough to include the interests of the dissenting women, the respondent women are now in no position to complain when the dissenters try to defend those very interests. Having taken advantage of the federal class action statute which brings them to federal court in the first place, litigants in the position of the respondent women must learn to take the bitter with the sweet.[5]

C. THE RESPONDENTS EFFECTIVELY CONCEDED THAT DIAMOND IS INAPPLICABLE

We agree that federal courts have an independent duty to search the record for defects in subject matter jurisdiction. But we think it worth noting that counsel for the respondent women are the leading attorneys in the nation of the doctrine of *Diamond v. Charles*[6], that they themselves successfully argued that doctrine in *Diamond* itself, and yet they never once

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5. *See, Arnett v. Kennedy*, 416 U.S. 134, 153-154, 94 S.Ct. 1633, 1644, 40 L.Ed.2d 15, 33 (1974) (Plurality Opinion of Rehnquist, J.).

6. *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986).

raised that issue in the district court or in the Seventh Circuit to even suggest that the dissenting women did not have standing.

Never once was *Diamond* even mentioned in any way by anyone or by the district or appellate court, in any written document or oral presentation in either of those courts, until the Seventh Circuit issued its opinion.

This was no oversight on the respondents' part; they had not forgotten about *Diamond*. They simply knew it didn't apply; and so they never briefed or argued in reliance on it.

II. THE OPINION OF THE SEVENTH CIRCUIT STANDS DIAMOND ON ITS HEAD

The basic principle of *Diamond* is that those who lack the authority to perform a function of state government lack standing in federal courts to take upon themselves the mantle of state authority and use the federal courts to eviscerate an office of state government and the provisions of state law[7]. But that is precisely what will happen if the judgment of the Seventh Circuit is allowed to stand.

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7. *Diamond*, 476 U.S. at 64-65, 106 S.Ct at 1704-1705, 90 L.Ed.2d at 59.

A. CONSIDERATIONS OF COMITY AND FEDERALISM REQUIRE THE FEDERAL COURTS TO RECOGNIZE THE STANDING OF THE PETITIONERS

Assuming, *arguendo*, that the petitioners do not have standing under the doctrines pertaining to such as they exist now on their face, it would still violate basic principles of federalism to deny standing here.

On the subject of standing the Supreme Court of Illinois has stated the well-established Illinois rule that "a court will consider the validity of a statute only at the instance of the parties directly affected by its invalidity." However, in the next sentence the Supreme Court also noted the important caveat to the Illinois rule which provides that "if the unconstitutional feature is of such a character as to render the entire act void this court will entertain objections to its validity."[8] (citations omitted). Thus, in Illinois courts all of the Petitioners could object to the adoption of a judicially created, void statutory scheme.

We respectfully submit that a federal rule of standing which allows the respondents to use the federal courts to defeat the standing which citizens of a state would enjoy in their own state court is as serious

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8. *Huckaba v. Cox*, 150 N.E.2d 832, 843, 14 Ill.2d 126, 129 (1958); *see also, People v. Palkes*, 288 N.E.2d 469, 52 Ill.2d 472 (1972), *appeal dismissed* 411 U.S. 923; *People v. Vandiver*, 283 N.E.2d 681, 51 Ill.2d 525 (1971); *Edelen v. Hogsett*, 254 N.E.2d 435, 44 Ill.2d 215 (1969).

a breach of federalism as *Swift v. Tyson*[9] was, which this Court overruled in *Erie v. Tompkins*[10]. And a federal rule which allows certain private citizens and state officers to take on an unwarranted, unconstitutional mantle of state authority and then use this mantle and the federal courts to evade the state law rule of standing which would allow the petitioners to prevail is a rule which runs squarely contrary to *Diamond* itself.

Indeed, this Court expressly recognized in *Diamond* that state law may create rights, the invasion of which may confer standing in federal courts.[11]

This Court has recognized that principles of comity and federalism require the federal courts to tailor their doctrines to respect state sovereignty[12]. We ask this Court to find that *Diamond* has been misapplied by the Seventh Circuit, and to tailor this Court's doctrine in *Diamond* to better effectuate the very purposes for which the *Diamond* doctrine exists.

We ask this Court to recognize once again that federalism has substantive as well as procedural dimensions.

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9. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842).

10. *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

11. *Diamond*, 476 U.S. at 65 n. 17, 106 S.Ct. at 1705 n. 17, 90 L.Ed.2d at 60, n. 17.

12. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 n. 13, 104 S.Ct. 900, 910 n. 13, 79 L.Ed.2d 67, 81, n. 13.

B. THE ILLINOIS RULE IS CONSISTENT WITH FEDERAL RULES OF STANDING

The Seventh Circuit found itself faced with two questions of subject matter jurisdiction---the authority of the court to accept an unconstitutional act, and the standing of the Petitioners to raise such objections. The Seventh Circuit made no express finding as to the order they should be addressed, but the court determined *sub silencio* that standing should be addressed first.

This sets federal rules pertaining to subject matter jurisdiction at odds with themselves. It is uniformly held throughout the federal jurisdiction not only that all questions of subject matter jurisdiction may be raised at any time by the parties, but that the courts even have a duty to do so *sua sponte*, to examine not only their own jurisdiction, but also that of the courts below.[13] In this case the Seventh Circuit chose to address standing first. Even if the Seventh Circuit's conclusion on standing had been correct, it still would have reached the opposite result if it had addressed the void character of the settlement proposal first. Only this Court can provide the clarification needed on this procedural aspect of subject matter jurisdiction.

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13. *Bender v. Williamsport Area School Dist.* 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986), *reh. den.* 476 U.S. 1132; *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988); *U.S. v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), *reh. den.* 796 F.2d 1478, *cert. den. Board of Trustees of Alabama State University v. Alabama State Board of Education*, 479 U.S. 1085; *In re Rini*, 782 F.2d

Under the rule effectively embraced by the Seventh Circuit, a federal judge may dismiss a case for lack of subject matter jurisdiction by reason of some point which occurs to him on his own, or which he reads in an article, or which is written on a note that is slipped under his door--but not if the point is brought to his attention by someone who is at least a *prima facie* party to the case.

This allows federal courts to undertake a wholly unlawful enterprise, nowhere authorized by Article III of the U.S. Constitution or by federal statute, and get away with it if such illegality is made known by someone who has made a good-faith attempt to appear before the court, but not if the illegality is made known by a passing remark from a stranger on the street.

As a matter of logic, it makes far more sense for federal courts to first determine whether it is lawful for them to do the thing which they are asked to do. For otherwise an utterly unlawful, unauthorized act by the federal courts will not only be perpetrated by them but will even be defended by them by a rule of standing which is precisely designed to prevent the court from doing unlawful, unauthorized acts.

The Illinois standing rule obviates this dilemma,

(note 13, cont'd)
603 (6th Cir. 1986); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985); *Kanzelberger v. Kanzelberger*, 782 F.2d 774 (7th Cir. 1986); *Minnesota Chippewa Tribe Red Lake Band v. U.S.*, 768 F.2d 338 (Fed. Cir. 1985).

and prevents an unlawfully crafted and unlawfully accepted settlement proposal from becoming *res judicata*.

C. THE USE OF THE ILLINOIS RULE CAN BE NARROWLY TAILORED TO THE NEEDS OF THIS CASE

There is no need for this Court to accept the Illinois rule as a general principle for federal courts if it deems it prudent to tailor its doctrines of standing to the precise needs of the case. The precedent which this Court may set may simply be that in cases in which a state's law would allow persons standing to object on the basis of illegality or a lack of subject matter jurisdiction, it would be an invasion of federalism for federal courts to deny standing for that limited purpose. Indeed, the precedent set could be narrower.

Nor do we ask this Court for a rule which would allow persons to have standing in federal court anytime they would have standing in state court, for this would then allow standing in federal court in states which allow their own courts to render advisory opinions; such a rule would be far more broad than anything we seek here.

The Illinois rule, we should note, does not apply to cases in which the result which may be achieved may be simply erroneous, or in which the exercise of jurisdiction may be questionable or flawed. By its own terms the Illinois rule applies only to those cases in which the action objected to "...is of such a character as to render

the entire act void...".[14]

We merely submit that in cases in which the validity of a state law is in question, where a state law rule of standing which does not operate contrary to the subject matter jurisdictional requirements of federal courts would allow a citizen of a state to object to an act of the court which is unlawful or outside of the court's subject matter jurisdiction, then the federal courts, as a matter of comity and federalism, should not deny citizens of a state the limited standing which they would have in state court to raise such objections. This is particularly the case when the objection is raised by someone who is at least *prima facie* a party to the case.

III. THERE IS A SPLIT OF AUTHORITY IN THE CIRCUIT COURTS OF APPEALS AS TO WHETHER A PARTY MAY BE ORDERED TO PARTICIPATE IN SETTLEMENT NEGOTIATIONS

Our defendant class representative participated in the settlement negotiations only after being ordered to do so by the District Court. (A-45) In 1989 the Seventh Circuit, en banc, in 6 to 5 decision held that a district court may enter such an order. The Seventh Circuit was faced with the question of whether such an order constitutes an inherent power of the court designed to give effect to the Federal Rules of Civil Procedure or

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14. *Huckaba, supra,* 150 N.E.2d at 843, 14 Ill.2d at 129.

whether it constitutes an unwarranted expansion of the court's power beyond the Federal Rules.[15]

Five dissents were filed in that opinion. We wish to direct this Court's attention particularly to the dissent of Judge Ripple, joined by Judge Coffey, in which Judge Ripple stated:

> "...the most enduring---and dangerous---impact of the majority's opinion will not be its effect on the conduct of the pretrial conference, but on the relationship between the Judiciary and the Congress in establishing practice and procedure for the federal courts."[16]

Prior to the Seventh Circuit's decision the Second and Eighth Circuits had already provided the only precedent on point. The Second Circuit flatly stated that Rule 16 "...was not designed as a means for clubbing the parties---or one of them---into an involuntary compromise."[17] The Eighth Circuit has said that the district court should avoid the appearance as well as the reality of coercing a settlement.[18]

Now the Eleventh Circuit has joined the Seventh

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15. *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc).

16. *G. Heileman Brewing Co., Inc.*, 871 F.2d at 665 (Ripple, J., dissenting).

17. *Kothe v. Smith*, 771 F.2d 667 (2nd Cir. 1985).

18. *In re Ashcroft*, 888 F.2d 546, *reh. den.* (8th Cir. 1989).

Circuit in holding that district courts may coerce a party to participate in settlement negotiations, despite the fact that in doing so the court expressly acknowledged that under the advisory notes on Rule 16, the purpose of the Rule is not "...to impose settlement negotiations on unwilling litigants."[19]

Such a construction of the Federal Rules is particularly egregious when a party is ordered to participate in crafting an unlawful settlement proposal which the district court lacks subject matter jurisdiction to approve.

IV. THE RELIEF OF A LATER COLLATERAL ATTACK ON THIS UNLAWFUL SETTLEMENT PROPOSAL DOES NOT EXIST AS A PRACTICAL MATTER

The illegal settlement cannot be collaterally attacked, as Judge Posner suggests. Such attacks are as extremely disfavored in the federal system as they are in the courts of Illinois.[20] The hundreds of thousands of dollars in legal expense which this case has already cost is enough to crush our county budgets; we cannot in good conscience subject our counties to a such cost in the future. With such prohibitive costs and possible contempt sanctions, collateral relief is no relief at all.

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19. *In re Novak*, 932 F.2d 1397, 1405, n. 15 (11th Cir. 1991).

20. *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940), *reh. den.* 309 U.S. 695; *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 53 S.Ct. 721, 77 L.Ed. 1331 (1933); *Old Wayne Mut. Life Ass'n v. McDonough*,

V. IT IS IMPERATIVE THAT THE LAW OF ABORTION BE CLARIFIED IMMEDIATELY

As law enforcement officials we are obliged to uphold Illinois law while simultaneously paying heed to this Court's decisions which do, on occasion, override Illinois law.

Illinois provides by statute that unborn children are persons, and that if *Roe v. Wade* is ever overruled or modified, unborn children are automatically entitled to be protected against abortion except where the mother's life is endangered.[21] Because this Court's recent decisions have modified *Roe*, Illinois unborn children are now entitled to have their standing under Illinois statutory and constitutional law recognized. Judge Posner recognized this right of Illinois unborn children to intervene throughout the appellate level.

(note 20, cont'd)
204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907); *City of New Orleans v. Fisher*, 180 U.S. 185, 21 S.Ct. 347, 45 L.Ed. 485 (1901); *Evers v. Watson*, 156 U.S. 527, 15 S.Ct. 430, 39 L.Ed. 520 (1895); *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 23 L.Ed. 336 (1875); *McNitt v. Turner*, 83 U.S. (16 Wall.) 352, 21 L.Ed. 341 (1872); *Gray v. Brignardello*, 68 U.S. (1 Wall.) 627, 17 L.Ed. 693 (1863); *Sargeant v. State Bank of Indiana*, 53 U.S. (12 How.) 371, 13 L.Ed. 1028 (1851); *Kennedy v. Bank of State of Georgia*, 49 U.S. (8 How.) 586, 12 L.Ed. 1209 (1850); *Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.* 738 F.2d 209 (7th Cir. 1984); *Kenner v. C.I.R.*, 387 F.2d 689 (7th Cir. 1968), *cert. den.* 393 U.S. 841, *reh. den.* 393 U.S. 971; *Hardy v. Bankers Life & Cas. Co.*, 232 F.2d 205 (7th Cir. 1956), *cert. den.* 351 U.S. 984; *Baker v. Brown*, 23 N.E.2d 710, 372 Ill. 336 (1939).

21. Illinois Abortion Act of 1975, Ill.Rev.Stat., Ch. 38, Sec 81-21.

Unfortunately, the Seventh Circuit erroneously held that the efforts of the proposed intervenors were an attempt to enforce statutory enactments duly enacted by the Illinois General Assembly. Although these enactments are the subject matter of this case in its earlier form as it already exists on this Court's docket (88-790), the illegal and unconstitutional settlement proposal is the only subject matter of the present certiorari petition (91-808).

Since unborn children are now entitled to have their standing recognized, they can now object to a void settlement proposal. The question is whether the modification of *Roe* is such that the several states are still precluded from establishing personhood for these unborn children? Only this Court can answer that question. As the chief executive and enforcement officers for our counties, we must know the answer to that question to enable us to enforce the appropriate laws correctly.

CONCLUSION

We ask the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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(4)

No. 91-808

In The
Supreme Court of the United States
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RITAELLEN M. MURPHY, R.N., et al.,

Petitioners,

vs.

RICHARD M. RAGSDALE, M.D., et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

AMICUS CURIAE BRIEF OF CERTAIN MEMBERS OF THE GENERAL ASSEMBLY OF THE STATE OF ILLINOIS IN SUPPORT OF PETITIONERS-APPELLANTS

(amici listed inside front cover)

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*****

Representative Dan Cronin
(Republican)
40th Representative District

*****

Representative DeLoris Doederlein
(Republican)
65th Representative District

*****

Representative Monroe L. Flinn
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114th Representative District

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Representative E. J. "Zeke" Giorgi
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68th Representative District

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Representative David Harris
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53rd Representative District

Representative Donald N. Hensel
(Republican)
50th Representative District

*****

Senator George "Ray" Hudson
(Republican)
41st Legislative District

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Senator Ted. Leverenz
(Democrat)
26th Legislative District

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Representative Roger P. McAuliffe
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Representative Thomas J. McCracken, Jr.
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Representative Andrew J. McGann
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Representative John J. McNamara
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27th Representative District

Representative N. Duane Noland
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102nd Representative District

*****

Representative J. Phillip Novak
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86th Representative District

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(Republican)
49th Representative District

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Representative Bernard E. Pedersen
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Representative Edward F. Petka
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Note: The written consents to file this *amicus curiae* brief have been obtained from all of the parties and are on file in the Clerk's Office.

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House of Representatives

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* constitute a bipartisan group of Illinois legislators from both houses of the Illinois General Assembly. Although the *amici* have differing views on abortion as public policy, all of the *amici* do support the authority of state legislatures and administrative agencies to regulate outpatient surgical facilities to promote public health, to protect the safety of women undergoing abortions, and to contain the rising costs of medical care.

On April 13, 1988, the Seventh Circuit Court of Appeals in a divided opinion declared certain medical statutes and regulations unconstitutional because of the Illinois General Assembly's presumed bad "motive" (i.e., to regulate abortion). The majority ignored compelling evidence of the need for regulatory control of outpatient surgical facilities in 1973, and the need for more intensive regulation of abortion clinics discovered in 1978. Judge Coffey wrote a caustic dissent.

On July 3, 1989 the Court recognized the exceptional importance of the *Ragsdale* case and took the case on appeal. On March 22, 1990 the District Court approved a proposed settlement from which the Petitioners have appealed.

On August 20, 1990, the Seventh Circuit Court of Appeals in a divided opinion denied appellate standing to two members of the plaintiff class of women who desire or may desire an abortion some-

time in the future. The majority held that the same medical statutes and regulations were adopted by the Illinois General Assembly for another presumed bad "motive" (i.e., to limit the number of abortions by making abortions more expensive). The Court of Appeals reasoned that since the statutes were gutted, the Petitioners had no harm from which to appeal. Judge Flaum wrote a scathing dissent.

In both the 1988 and 1991 opinions the Court of Appeals ignored the actual legislative history and true motives of the Illinois General Assembly which had adopted a statutory scheme designed to limit medical costs and to assure the health and safety of Illinois citizens.

When this Court first granted certiorari in 1989 our primary concern was possible limits imposed on our constitutional authority to medically regulate abortions, thus impeding our ability both to provide for public health and safety and to curtail escalating medical costs.

However, in approving the proposed settlement the District Court directly undercut the constitutional integrity of the Illinois General Assembly. Illinois statutes were rewritten and legislative enactments which had previously been held constitutional were enjoined. By rejecting the standing of Petitioners the Court of Appeals denied to them their right under Illinois law to constitutionally challenge these void legislative enactments. To safeguard our very sovereignty we feel impelled to file this *amici curiae* brief in support of Appellants.

SUMMARY OF ARGUMENT

The central issue is state sovereignty and the constitutional integrity of the Illinois General Assembly. Under the Illinois Constitution of 1970 the Illinois General Assembly is the exclusive legislative branch of the State of Illinois. This authority to legislate cannot be delegated to any other branch of government, to any administrative agency, or to any individual.

Yet certain members of the executive branch, certain administrative agencies, and certain private individuals chose to rewrite a statutory scheme duly enacted by the Illinois General Assembly. That scheme provided in part that all abortion procedures would be performed at medically regulated sites. This express statutory enactment was rejected by the consent of the parties, and was then redrafted by them, without any constitutional authority whatsoever.

Statutory provisions were rejected by injunction which had previously been held constitutional. When these provisions were enjoined, no finding of unconstitutionality was ever made.

When the District Court approved the settlement proposal, and the newly crafted statutory scheme which the parties themselves had made up on their own, the Tenth Amendment to the United States Constitution lost all form and substance. For certainly any limits imposed by federalism have

been breached and the exclusive legislative prerogative of the Illinois General Assembly has been destroyed.

When the Court of Appeals rejected the standing of the Petitioners, any prospect of setting right the wrong imposed by the District Court was quashed. Standing was rejected by the Court of Appeals only because it once again redefined the legislative motive of the Illinois General Assembly to supposedly eliminate abortion and placed "gambits beyond the possibility of appellate correction."

As a result, Petitioners, who are members of the plaintiff class of women who desire or may desire an abortion sometime in the future, were denied standing. The Court of Appeals erroneously concluded, without so much as a scintilla of evidence from the record, that these women were ideological litigants only, and that they therefore suffered no harm when the proposed settlement "gutted" the statutes.

Issues of ideology are moot in this case, though, because no matter what the ideology of the dissenting women may be, Illinois provides by statute that abortion shall always be legal to protect the life of the mother. So whether these women desire abortion to be legal under virtually all circumstances or under limited circumstances, they still may desire an abortion to save their own lives if such a circumstance should ever arise. And in such a case, Illinois statutory law is designed to protect them against the back-alley butchers in Illinois who now have offices

on Main Street.

As the only solution, Judge Posner suggested that a collateral attack could be made by a future executive officer who would seek to enforce the statutes "in defiance of the consent decree." However, no executive officer would place himself in such a position.

When the settlement negotiations were taking place, the Cook County State's Attorney, as representative of a class consisting of the State's Attorneys of Illinois, participated only because he was ordered to do so by the District Court.

If the class representative only participated in settlement negotiations out of fear of sanctions by the District Court, how much more would an executive officer fear sanctions by defying a consent decree that the District Court approved and the Court of Appeals affirmed?

The State of Illinois is already facing a request for hundreds of thousand of dollars of attorneys' fees and costs supposedly incurred by Appellees. To approve the settlement the District Court did not hesitate to rewrite Illinois statutory law without constitutional authority. To deny appellate standing the Court of Appeals did not hesitate to redefine legislative motive without regard for either legislative intent or history.

One does not need a divining rod to know the outcome of the request for legal fees by the ACLU and

Dr. Ragsdale if this Court refuses to grant the request for certiorari. The State of Illinois will be faced with paying legal fees incurred by the opposition in negotiating an illegal and unconstitutional settlement which Judge Posner concluded that the District Court failed "to probe the adequacy of." And Judge Flaum agreed.

Finally, Judge Flaum was correct when he stated that "certain of the individuals before us can appropriately challenge that settlement." First, if legislative motive is not redefined, the class members have standing. Second, as Judge Flaum stated, class members should be able to challenge a settlement achieved by improper procedures regardless. Third, Illinois law permits any person to challenge void statutory enactments such as the newly created statutory scheme adopted by the District Court. Fourth, unborn children as persons under Illinois law have constitutionally based standing. But any standing exists only if this Court grants certiorari and holds that standing does exist.

ARGUMENT

I. THE AMBULATORY SURGICAL TREATMENT CENTER ACT WAS ENACTED IN 1973 TO PROMOTE PUBLIC HEALTH AND SAFETY THROUGH THE REGULATION OF COST-EFFECTIVE OUT-PATIENT SURGICAL TREATMENT CENTERS.

A. AMBULATORY SURGICAL TREATMENT CENTERS ORIGINATED OVER 20 YEARS AGO.

What had begun as a free-standing "Surgicenter" in 1970 had within a few short years become a national trend toward ambulatory surgical treatment centers. As commentator L. Burns noted:

> The success of the (first "Surgicenter") precipitated rapid growth of *a new type of facility for the delivery of ambulatory surgery, the free-standing, independent, ambulatory surgery center.* Since that time, the Surgicenter has become a model for an increasing number of both independent and hospital-sponsored free-standing ambulatory surgery programs. According to the Freestanding Ambulatory Surgical Association (FASA), there are approely 125 independent free-standing ambulatory surgery centers, 96 of which are members of FASA. According to FASA, which has been keeping statistics on its members since 1974, the membership performed 94,499 ambulatory surgery procedures in 1981, an increase of 6 percent over the number performed in 1980. This figure can be compared to 3.2 million ambulatory surgical procedures performed by hospitals offering ambulatory surgery in 1980.

L. Burns, *Ambulatory Surgery, Developing and Managing Successful Programs*, pp. 11-12 (1984). See

also D. Ermann and J. Gabel, *The Changing Face of American Health Care, Multi-Hospital System, Emergency Centers, and Surgery Centers*, 23 Medical Care 401, 406 (May 1985).

B. THE IMPETUS BEHIND THE RAPID DEVELOPMENT OF AMBULATORY SURGICAL TREATMENT CENTERS HAS BEEN TO MAKE OUT-PATIENT SURGERY COST-EFFECTIVE.

As a practical matter, ambulatory surgical centers have historically been the solution to cost-effective and safe day surgery. As T. O'Donovan observed in his treatise on ambulatory centers:

> From a societal point of view, perhaps *the greatest impetus behind the ambulatory surgery concept is its potential for reducing the cost of services.* This potential applies to both freestanding and hospital-based facilities, the two major prototypes for ambulatory surgery. By eliminating overnight hospital stays, expenditures for hospital services...may be reduced directly and dramatically...By focusing on reducing inpatient surgery...ambulatory surgery may further reduce costs. (emphasis supplied).

T. O'Donovan, *Ambulatory Surgical Centers, Development and Management*, p. 143 (1976).

C. THE AMBULATORY SURGICAL TREATMENT CENTER ACT WAS

DRAFTED BY A POLITICAL CROSS-SPECTRUM OF ILLINOIS MEDICAL ORGANIZATIONS.

The Ambulatory Surgical Treatment Center Act was created by Senate Bill 1051, which was sponsored by Senator Wooten. Legislative Synopsis and Digest, 1973 Sess. 78th Ill. Gen. Assem. at 508. The bill was drafted by the Illinois State Medical Society, which supports legalized abortion, the Illinois Hospital Association and the Illinois Department of Public Health. 78th Ill. Gen. Assem. Senate Proceedings, May 29, 1973, at 26; House Proceedings, July 1, 1973, at 106.

D. THE LEGISLATIVE HISTORY DEMONSTRATES A STRONG LEGISLATIVE CONCERN FOR REDUCING SURGICAL COST AND PROVIDING FOR PUBLIC HEALTH AND SAFETY.

Senator Wooten explained the purpose of the bill on the Senate floor:

> (Senate Bill 1051) has to do with the ambulatory-surgical treatment center, which is a center for the performance of minor surgery that does not require an overnight stay. *This...is an attempt to attack the very problem alluded to by Senator Sours, the tremendous expense of a hospital stay. Such centers are not limited to abortions. They can do all sorts of minor surgery.* (emphasis supplied).

Senate Proceedings, May 29, 1973, at 33-34. Later in the debate, Senator Wooten stated that:

> *While this has a relation to abortion, it actually goes much beyond that. It (S.B. 1051) provides for the establishment and licensing of facilities which can perform minor surgery.* This would be things like tonsillectomy, hernias, abortions would be included, facial surgery, plastic surgery and so on. In other words procedures which would not require an overnight stay. And indeed these ambulatory surgical treatment centers are forbidden to keep patients overnight. However, those of you who have kept close to medical practices know that untoward things can occur at any time, and so provision is made in here that *doctors who function in such a center must also be licensed to practice in a hospital nearby so that if any complications occur they can quickly move the patient to that place.* Now, I handed out an outline to explain to you how these things would work, definitions, they must get a license, some of these are left open as to regulations. The Department would like to take a hand in that. *This is something doctors have been urging us to do for a couple of years now, and ambulatory surgical treatment centers are...in effect out west. The idea is that they can be a great savings to a patient.* One of the big costs in a hospital, if you remember it's kind of like a hotel which has special services and if you don't need that overnight stay, you

> can save a great deal of money. So there's a great savings possible for the patient who needs this kind of one-day surgical treatment. *It does include abortion, and everything would be rather closely regulated and inspected.* (emphasis added).

Senate Proceedings, June 1, 1973, at 43. Another state senator further pointed out that :

> This bill is a good bill. It's not related in any way to abortions. It's sponsored by the Medical Association. There's nothing wrong with ambulatory medical services.

Comments of Senator Knuppel, Senate Proceedings, June 1, 1973, at 44.

Responding to Senator Ozinga's accusation that the bill would make abortions easier to obtain, Senator Wooten stated that "*the main thrust of this is to try to save some money by getting minor surgical treatment out of the hospital where it is hideously expensive and into a clinic.*" (emphasis added). Senate Proceedings, June 1, 1973, at 45.

The Senate approved the bill on a vote of 30 to 6, one member voting present. Illinois Senate Journal (1973) at 1531.

The bill was then taken up by the House of Representatives. The House sponsor, Representative Day, spoke in support of the bill:

> Now the last Bill...licenses Ambulatory Surgical Treatment Centers....*(T)his Bill is not limited to the matter of abortions, but it would include such things as (o)ral (s)urgery or very minor operations or stitching in case someone needs a few stitches and it fairly sets up stringent regulations for the licensing of these facilities.* It provides that they must be operated under the medical supervision of a physician and that if surgery is performed by a doctor, it must be by a doctor who can admit a patient to a hospital if complications arise. *(Senate bill 1051) (c)ontains very strict regulations for the licensing of these Ambulatory Surgical Treatment Centers.* (emphasis supplied).

House Proceedings, July 1, 1973, at 107. Immediately before the final vote in the House, Representative B.B. Wolfe spoke in favor of Senate Bills 1049, 1050 and 1051:

> *(A)n editorial (in the Chicago Sun Times)...said, "(W)e urge House Members, many of whom are violently opposed to... legislation on abortion to view the measures not as pro-abortion Bills but as public health measures.(") That is what they are and they should be approved as such* and I heartily endorse this package because it is the only one in the State of Illinois to carry out quality medicine in this area.

House Proceedings, July 1, 1973, at 110.

The House of Representatives approved Senate Bill 1051 on a vote of 111 to 14, twenty-four members voting present. Illinois House Journal (1973) at 5034-35.

The bipartisan support for this bill in both the Senate and the House of Representatives was overwhelming.

E. THE EXPRESS LEGISLATIVE INTENT OF THE AMBULATORY SURGICAL TREATMENT CENTER ACT IS TO PROTECT PUBLIC HEALTH.

The text of the statute which specifies with clarity the intent of the Illinois General Assembly in enacting the Ambulatory Surgical Treatment Center Act:

> It is declared to be the public policy that the State has a legitimate interest in assuring that all medical procedures, including abortions, are performed under circumstances that insure maximum safety. Therefore, the *purpose of this Act is to provide for the better protection of the public health* through the development, establishment, and enforcement of standards (1) for the care of individuals in ambulatory surgical treatment centers, and (2) for the construction, maintenance and operation of ambulatory surgical treatment centers, which, in light of advancing knowledge, will promote safe and adequate treatment of such individuals in

ambulatory surgical treatment centers. (emphasis supplied).

Ill.Rev.Stat., ch. 111 1/2, par. 157-8.2.

II. IGNORING THE NATIONAL DEVELOPMENT OF OUT-PATIENT SURGICAL CENTERS, THE ILLINOIS LEGISLATIVE HISTORY AND THE EXPRESS PURPOSE OF THE STATUTE, THE COURT OF APPEALS ERRONEOUSLY REDEFINED LEGISLATIVE MOTIVE.

A. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE STATUTE WAS PASSED TO LIMIT THE NUMBER OF ABORTIONS BY MAKING ABORTIONS MORE EXPENSIVE.

Although Judge Posner aptly noted in his treatise on the federal courts that "a court should adhere to the enacting legislature's purposes," this is precisely what the majority failed to do in the instant case. Posner, *The Federal Courts*, p. 279 (1985). Judge Posner, in violation of his own writings, joined Judge Fairchild in creating a new judicially created legislative intent stated that:

> The consent decree guts a statute that was (to speak realistically) designed to limit the number of abortions performed in Illinois by making abortion more expensive. Judge Posner's concurring opinion at A-10.

B. THE COURT OF APPEALS IGNORED

THE TESTIMONY AND EVIDENCE PRESENTED IN THE RAGSDALE CASE.

The majority did not focus on how the enforcement of the Ambulatory Surgical Treatment Center Act actually effected health care costs. We agree with Judge Coffey that any increase in costs would be *de minimus*:

> The record reveals that Dr. Ragsdale testified that he estimated the added costs of complying withe the regulations *over and above the costs required simply to relocate his current practice in such a manner as he deemed appropriate for his needs*, as $25.21 per patient. (Ragsdale Tr., 400-401). This added costs of $25.21 certainly cannot be considered as significantly more than the $19.40 (less than a $5 difference) increase per abortion for tissue examination upheld by the Supreme Court in *Ashcroft* because "in light of the substantial benefits that a pathologist's examination can have, this small cost is clearly justified." 462 U.S. at 490, 103 S.Ct. at 2524. Moreover, it should be pointed out that the increased cost testified to herein, unlike the one in *Ashcroft*, would at best only be temporary and not one that would remain ad infinitum. Dr. Ragsdale admitted that "much of the debt would be retired after two to five years." Thus, after two years the fee increase would be reduce to $10.90 per patient, and after five years to

> a mere $3.40 per patient. I am convinced that the minimal engineering and construction design requirements allegedly at issue, which ensure only that all surgical procedures performed in ASTC's, including first-trimester abortions, are performed in clean, sanitary, and safe structures are a substantial benefit to the health and safety of patients, and the minuscule financial impact referred to is clearly *de minimus* and justified.

Ragsdale v. Turnock, 841 F.2d 1358, 1392 (7th Cir. 1988) (Coffey, J., dissenting).

Although a *de minimus* cost increase of a few dollars resulted within ambulatory surgical treatment centers, the resulting savings from performing these surgeries on an out-patient rather than in-patient basis was substantial. Judge Coffey clearly pointed out how the savings is achieved by having these proceedures no longer performed in hospitals:

> Plaintiff's counsel stated during closing argument before the district court that the fee charged in a hospital for an abortion was $1,000 and that the hospital fee was 2.5 to 4 times greater than the cost of an abortion performed in an outpatient facility (including a physician's office). Thus according to plaintiff's counsel, an outpatient abortion costs $250 to $400.

Ragsdale v. Turnock, 841 F.2d 1358, 1392 (7th Cir.

1988) (Coffey, J., dissenting).

C. THE DE MINIMUS COST INCREASES WERE FURTHER JUSTIFIED BY HORRENDOUS MEDICAL PRACTICES AT ABORTION CLINICS.

After a five-month investigation, the Chicago Sun-Times and the Better Government Association published a series of articles entitled, "The Abortion Profiteers," in November, 1978, which disclosed that at least twelve women had died following abortions in Chicago abortion clinics; that abortions were performed under unsterile conditions on women who were not pregnant, with or without anesthesia; that patients were forced to leave the recovery room prematurely; that medical records were falsified; and that kickbacks were paid for abortion referrals.

In response to these conditions, we had to regulate abortion practices in Illinois. Through our duly enacted statutory scheme we would have been able to halt these practices with a *de minimus* cost of a few dollars. We believe now, as we did then, that the health and safety, the very lives of Illinois women are worth far more than$3.40 per patient procedure.

D. IN THE INTERESTS OF JUSTICE THE COURT SHOULD RECOGNIZE THE STANDING OF PETITIONERS.

Our only hope and the hope of Illinois women is that this Court will recognize that we did not enact this statutory scheme to make abortions more ex-

pensive. For the lone remaining protectors of our exclusive legislative sovereignty and the health and very lives of Illinois women are the Petitioners-Appellants whose standing is unquestionable.

III. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION.

A. SECTION ONE OF THE ABORTION ACT HAS BEEN HELD CONSTITUTIONAL

Federal appellate and district courts have repeatedly found Section One of the Illinois Abortion Act of 1975, which establishes the personhood of unborn children and proscribes abortion except to save the life of the mother, to be constitutional; for Section One also provides that these Provisions become operative only if Roe is ever modified or overruled. No constitutional infirmity of any kind has ever been found in Section One. See Ill.Rev.Stat., ch. 38, sec. 81-21.

Section One was initially attacked on the grounds that it was "the product of an impermissible state purpose, to discourage and frustrate a woman's right to an abortion in every case." *Wynn v. Scott*, 449 F.Supp. 1302, 1314 (N.D.Ill. 1978). This argument was rejected on the grounds that Section One "states that the intention of the General Assembly is to reasonably regulate abortions in conformity with Supreme Court decision." *Id.*

The Court of Appeals affirmed, *Wynn v. Carey*,

599 F.2d 193 (7th Cir. 1979). Illinois recognizes that federal courts have left Section One undisturbed. *Wilczynski v. Goodman*, 391 N.E.2d 479, 73 Ill.App.3d 51 (1979).

Not to be discouraged, opponents of Section One tried again. The Court of Appeals rejected their arguments once again, saying that Section One, read as a whole, does not express an unlawful purpose. *Charles v. Carey*, 627 F.2d 772, 779 (7th Cir.1980).

Three years later they took another bite at the apple. The District Court rejected them outright, stating simply, "Section One shall not be permanently enjoined." *Charles v. Carey*, 579 F.Supp. 464 (N.D.Ill. 1983).

This Court has twice taken note of these proceedings. *Carey v. Wynn*, 439 U.S. 8 (1978); *Diamond v. Charles*, 476 U.S. 54 (1986).

We are left wondering, then, how it is that a federal court could have jurisdiction to effectively enjoin a state legislative act which has never been found to violate any provision of federal law. Such an act by the District Court in this case assumes the existence of a general power to grant injunctive relief in the federal courts instead of limited injunctive powers dependent upon some provision of federal law allowing for such relief.

B. THIS COURT HAS RECOGNIZED STANDING IN FEDERAL COURT

BASED UPON RIGHTS CONFERRED BY STATE LAW.

As this Court has said, the Illinois General Assembly "has the power to create new interests, the invasion of which may confer standing." *Diamond v. Charles*, 476 U.S. 54, 65 n. 17 (1986). We created those very rights in unborn children in Section One. By provision of Section One, those rights became operative when this Court's recent decisions modified *Roe*. It was reversible error for the Court of Appeals and the District Court not to recognize this.

As legislators, we need the clarity that only the Court can provide us with to define our legislative authority in this period of judicial uncertainty.

CONCLUSION

For the foregoing reasons, we ask this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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